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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1552

CLAUDIO CASTANEDA, SHERIFF, *Petitioner*

v.

RODRIGO PARTIDA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Claudio Castaneda, Sheriff of Hidalgo County, Texas, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing the district court below, entered in the above entitled case on December 11, 1975.

OPINION BELOW

The opinion delivered by the Fifth Circuit Court of Appeals, is reported at 524 F.2d 481 (1975), and is appended to this Petition as Appendix "A". The opinion delivered by the United States District Court for the

Southern District of Texas as reported at 384 F.Supp. 79 (1974), which was reversed by the Court of Appeals, is attached as Appendix "B".

Also attached as Appendix "C" is a copy of the judgment of the Court of Appeals. A copy of the order denying the Petition for Rehearing en Banc is attached hereto as Appendix "D". A copy of the Stay of Mandate is appended hereto as Appendix "E".

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on December 11, 1975 (See Appendix "A"). The jurisdiction of the Supreme Court is invoked pursuant to 18 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

I. Whether or not the Petitioner rebutted the Respondent's prima facie case of discrimination in grand jury selection.

II. Whether or not the decision of the United States Court of Appeals for the Fifth Circuit is in conflict with several Supreme Court decisions.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment Fourteen, Sec. 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Texas Code of Criminal Procedure, Annotated, Article 19.01 (Amended):

> "The district judge, at or during any term of court, shall appoint not less than three, nor more than five persons to perform the duties of jury commissioners, and shall cause the sheriff to notify them of their appointment, and when and where they are to appear. The district judge shall, in the order appointing such commissioners, designate whether such commissioners shall serve during the term at which selected or for the next succeeding term. Such commissioners shall receive as compensation for each day or part thereof they may serve the sum of Ten Dollars, and they shall possess the following qualifications:
>
> 1. Be intelligent citizens of the county and able to read and write the English language;
>
> 2. Be qualified jurors in the county;
>
> 3. Have no suit in said court which requires intervention of a jury;
>
> 4. Be residents of different portions of the county; and
>
> 5. The same person shall not act as jury commissioner more than once in the same year."

Texas C.C.P., Annotated, Article 19.03:

> "When the appointees appear before the judge, he shall administer to them the following oath: 'You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning

the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged'."

Texas C.C.P., Annotated, Article 19.06, (Amended):

"The jury commissioners shall select not less than 15 nor more than 20 persons from the citizens of different portions of the county to be summoned as grand jurors for the next term of court, or the term of court for which said commissioners were selected to serve, as directed in the order of the court selecting the commissioners."

Texas C.C.P., Annotated, Article 19.08, (Amended):

"No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the state, and of the county in which he is to serve, and be qualified under the Constitution and laws to vote in said county, provided that his failure to pay a poll tax or register to vote shall not be held to disqualify him in this instance;

2. He must be of sound mind and good moral character.

3. He must be able to read and write;

4. He must not have been convicted of any felony;

5. He must not be under indictment or other legal accusation for theft or of any felony."

Texas C.C.P., Annotated, Article 19.21:

"When as many as twelve persons summoned to serve as grand jurors are in attendance upon the Court, it shall proceed to test their qualifications as such."

Texas C.C.P., Annotated, Article 19.22:

"Each person who is presented to serve as a grand juror shall, before being impaneled, be interrogated on oath by the court or under his direction, touching his qualifications."

Texas C.C.P., Annotated, Article 19.23 (Amended):

"In trying the qualifications of any person to serve as a grand juror, he shall be asked:

1. Are you a citizen of this state and county, and qualified to vote in this county, under the Constitution and laws of this state?

2. Are you able to read and write?

3. Have you ever been convicted of a felony?

4. Are you under indictment or other legal accusation for theft or for any felony?"

Texas C.C.P., Annotated, Article 19.26:

"When twelve qualified jurors are found to be present, the court shall proceed to impanel them as a grand jury, unless a challenge is made, which may be to the array or to any particular person presented to serve as a grand juror."

STATEMENT OF THE CASE

The Respondent was indicted on March 17, 1972, for the offense of burglary of a private residence at night with intent to rape, contained in the first count of the indictment, and burglary, in the second count of the indictment. Thereafter, on December 19, 1972, the Respondent was found guilty by a jury of burglary of a private residence at night with intent to commit rape, after pleading not guilty.

A pre-sentence investigation was ordered, and on February 16, 1973, the Court sentenced Respondent to serve eight (8) years in the Texas Department of Corrections. From such action, the Respondent appealed. The conviction was affirmed by the Court of Criminal Appeals on March 6, 1974, in *Partida v. The State,* 506 S.W.2d 209. Thereafter, the Respondent filed an application for a Writ of Habeas Corpus in the United States District Court for the Southern District of Texas, claiming discrimination in the selection of the grand jury which indicted him. A hearing was held on his application. Judge Alamia of the 92nd District Court, the Court which impanelled the grand jury which indicted the Respondent, testified at the hearing concerning the manner of selecting grand jury commissioners and grand jury impanelling. At the request of the Court, the State filed a transcript of the proceedings wherein the grand jury which indicted the Respondent was selected and impanelled. Attached to the transcript of that proceeding was a list of the grand jurors originally selected by the grand jury commissioners which ultimately indicted the Respondent. This list indicates that 50 percent of the names appearing thereon were Spanish. The record indicates that 3 of the 5 jury commissioners, 5 of the grand jurors who returned the indictment, 7 of the petit jurors, the judge presiding at the trial, and the sheriff who served notice on the grand jurors to appear had Spanish surnames.

On October 26, 1974, the United States District Court denied the application for a Writ of Habeas Corpus and held:

(1) That the Respondent had not waived his right to object by failing to object at an earlier time; and

(2) That the Respondent had established a *bare prima facie* case by proving a long continued disproportion in the composition of the grand juries in Hidalgo County, but the Court held that it has been rebutted.

Attention is directed to Appendix "B". Thereafter, the Respondent appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals, in its opinion, attached as Appendix "A", found that Respondent's prima facie case of discrimination in grand jury selection was not rebutted and ordered the case reversed and remanded.

REASONS FOR GRANTING THE WRIT

I. Petitioner did effectively rebut Respondent's prima facie case of discrimination in grand jury selection.

The Respondent employed the "rule of exclusion" to establish his prima facie case of grand jury discrimination. He produced evidence that the total population of Hidalgo County, Texas, in the year 1970 was 181,535 persons. Of that number, some 143,611, or approximately 79.2%, were persons of Spanish language or Spanish surname. Evidence was then introduced to show the composition of the grand jury "lists" (the 15-20 persons selected by the grand jury commissioners from whom a grand jury panel of 12 is selected) over a ten year period of time, showing a statistical disparity of some 40.02%. The Petitioner countered with sworn testimony of District Judge J. A. Alamia, a Mexican-American, who selected the grand jury commissioners, who selected the grand jury

that indicted the Respondent. He testified that he had selected three out of five Mexican-Americans as grand jury commissioners. These five commissioners then selected twenty persons for the grand jury "list". Of this number, 50% were Mexican-Americans. The sheriff who summoned them was Mexican-American. Judge Alamia denied that any sort of discrimination against Mexican-Americans had entered into his selection of the grand jury commissioners. Mexican-Americans constitute a "governing majority" in Hidalgo County. The Texas system of selection of grand jurors allows the subjective element to enter into its jury selection process. Therefore, "If people in charge can choose whom they want, it is unlikely they will discriminate against themselves. A broader range of variation should be tolerated here, because the Texas selection system allows the governing majority to favor their group when selecting grand jurors". See *Partida v. Castaneda,* 384 F.Supp. 79 (Appendix "B").

II. Under Supreme Court Rule 19, 1(b), a writ of certiorari may be granted when a court of appeals has decided a federal question in a way in conflict with applicable decisions of the Supreme Court. In the instant case the Fifth Circuit has applied the equal protection clause of the federal constitution in a way not entirely consistent with several relevant Supreme Court decisions.

In the Court of Appeals' opinion, it is stated that "Judge Alamia offered no explanation for the disparity. Indeed, he testified that he sought a balance of grand jury commissioners according to ethnic origin, race, sex and age, *yet he did not instruct the commissioners to do the same.*" (Emphasis added.) It is the Petitioner's

position that such instructions from Judge Alamia would be a violation of the principle that "jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race". *Cassels v. Texas,* 339 U.S. 282. The Supreme Court has recently held in the case of *Taylor v. Louisiana* that "Our holding does not auger or authorize the fashioning of detailed jury selection codes by federal courts. The fair cross-section principle must have *much* leeway in application . . . Carter v. Jury Commission and other cases recognized broad discretion in the States in this respect. We do not depart from the principles enunciated in Carter." (See *Taylor v. Louisiana,* 95 S.Ct. 692.) The instant case is similar to that of *Swain v. Alabama,* 380 U.S. 202, where the Court held that "Here the commissioners denied that racial consideration entered into their selection of either their contacts in the community or the names of prospective jurors . . . Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think that the burden of proof was carried by petitioner in this case."

If the Court of Appeals is to require that Texas District Court Judges are to instruct grand jury commissioners to seek out racial and sexual quotas in filling the grand jury list, then it would be meaningless to retain such a system. In effect, the Court of Appeals' decision, by implication, has spelled the doom for the statutory scheme for selection of grand jurors as enacted by the elected representatives of the people of the State of Texas.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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Hidalgo County Courthouse
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CERTIFICATE OF SERVICE

I, THOMAS PARKER BEERY, a member of the Bar of the Supreme Court of the United States, do hereby certify that two (2) copies of the foregoing Petition for Writ of Certiorari have been served on Respondent by depositing same with the United States Postal Service, Certified Mail, postage prepaid, addressed as follows: David G. Hall, Law Offices of Texas Rural Legal Aid, Inc., 103 E. Third, Weslaco, Texas 78596, on this the ____ day of April, 1976.

THOMAS PARKER BEERY
Assistant Criminal District Attorney
Hidalgo County, Texas

APPENDIX "A"

Rodrigo PARTIDA,
Petitioner-Appellant,

v.

Claudio CASTANEDA, Sheriff,
Respondent-Appellee.

No. 74-3966.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

Dec. 11, 1975.

Habeas corpus relief was denied a state prisoner by the United States District Court for the Southern District of Texas at Brownsville, Reynaldo G. Garza, J., 384 F. Supp. 79, on the ground that, although petitioner had established a prima facie case of discrimination against Mexican-Americans in the grand jury selection process, such prima facie case had been rebutted. The prisoner appealed. The Court of Appeals, Dyer, Circuit Judge, held that the prisoner's prima facie case of discrimination was not rebutted by testimony of the state district judge who selected the grand jury commissioners in view of such judge's testimony that, although he sought balance of grand jury commissioners according to ethnic origin, race, and age, he did not instruct the commissioners to do the same and in view of his admission that the selection process had not resulted in ethnically represented panels. Proof that Mexican-Americans had governing majority status in the county likewise did not rebut the prima facie case.

Reversed and remanded for further proceedings.

Appeal from the United States District Court for the Southern District of Texas.

Before GODBOLD, DYER and MORGAN, Circuit Judges.

DYER, Circuit Judge:

Partida seeks habeas corpus relief contending that he was denied due process and equal protection of law because the grand jury of Hidalgo County, Texas, which indicted him, was unconstitutionally underrepresented by Mexican-Americans. The district court held that Partida had established a *prima facie* case of discrimination against Mexican-Americans in the grand jury selection process, but that it had been rebutted. Finding that the county's[1] evidence was insufficient to rebut the *prima facie* case, we reverse.

Partida was indicted on March 17, 1972, and was found guilty of the charge against him. On motion for a new trial, Partida presented his Mexican-American exclusion claim for the first time. His motion was denied and he appealed to the Texas Court of Criminal Appeals. Although his challenge to the grand jury was untimely[2] and,

1. The writ was directed to the Sheriff of Hildago County who was holding Partida.

2. Vernon's Ann. C. Cr. P. art. 19.27, provides in pertinent part:
"Before the grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. In no other way shall objections to the qualifications and legality of the grand jury be heard."
Art. 27.03 provides:
"[A] motion to set aside an indictment . . . may be based on the following:
. . . That the grand jury was illegally impaneled; provided, however, in order to raise such question on motion to set aside the indictment, the defendant must show that he did not have an opportunity to challenge the array at the time the grand jury was impaneled." Cf. F. R. Crim. P. 12(b)(2) and (f).

therefore, apparently waived,[3] the Texas court ignored that fact and proceeded to reject Partida's grand jury contention. *Partida v. State of Texas,* Tex. Cr. App., 1974, 506 S.W.2d 209. Thereafter, his petition for the writ was filed, dismissed, and this appeal taken.

[1] Initially, respondent asks us to deny petitioner federal habeas corpus relief because he waived his challenge to the composition of the grand jury. However, the waiver argument was made to the Texas Court of Criminal Appeals which nevertheless chose to consider the merits of the claim. Under these circumstances, habeas relief may lie and the district court was correct in reaching the merits. *Warden v. Hayden,* 1967, 387 U.S. 294, 297, fn. 3, 87 S.Ct. 1642, 18 L.Ed.2d 782; *Irvin v. Dowd,* 1959, 359 U.S. 394, 406, 79 S.Ct. 825, 3 L.Ed.2d 900; *Hale v. Henderson,* 6 Cir. 1973, 485 F.2d 266, 269.

[2, 3] Every criminal defendant is entitled to be indicted and tried by grand and petit juries whose members have been selected in a non-discriminatory manner. Jury discrimination, however, is nt an easy matter of proof. The "rule of exclusion" is usually utilized. According to this rule, a *prima facie* case of discrimination is established by showing a disparity between (1) the percentage which the ethnic or racial group constitutes of the persons from whom a jury list is drawn and (2) the percentage which that group constitutes of the jury list compiled. Once a defendant establishes his *prima facie* case, the burden shifts to the State to offer a satisfactory explanation why the disparity exists. *Muniz v. Beto,* 5 Cir. 1970, 434 F.2d 697, 700.

3. *Wilson v. Estelle,* 5 Cir. 1974, 504 F.2d 562, 563; *Tyson v. State,* 1943, 146 Tex. Cr. R. 128, 171 S.W.2d 496, 497-498.

Partida relied on the rule of exclusion to establish his *prima facie* case. First, he demonstrated that Mexican-Americans constituted a separately identifiable ethnic group in Hidalgo County, Texas. Then, he introduced evidence that in 1970, the total population of Hidalgo County was 181,535 persons of which 143,611, or approximately 79.2%, were persons of Spanish language or Spanish surname.[4] Next, petitioner presented evidence showing the composition of the grand jury lists[5] over a period of ten years prior to and including the term of court in which the indictment against him was returned. Of the 870 persons selected for grand jury duty, only 39.0% were Mexican-Americans. In the two and one-half year period previous to the indictment, 45.5% of the panelists were persons of Mexican descent.

[4] As these figures show, the disparity between Mexican-Americans in the population and those on the grand jury was significant: over the full ten year period, it was 40.2%; for the shorter two and one-half year period, it was 33.7%.[6] This disparity clearly establishes a *prima facie* case. *Black v. Curb*, 5 Cir. 1972, 464 F.2d 165; *Colson v. Smith*, 5 Cir. 1971, 438 F.2d 1075; *Preston v. Mandeville*, 5 Cir. 1970, 428 F.2d 1392; *Muniz v. Beto, supra.*

4. The figures were obtained from the 1970 Census of Population conducted by the United States Census Bureau, Department of Commerce. Since there was no contrary showing, we accept petitioner's assertion that the terms "Spanish surname" and "Spanish language" as used in the census reports are synonymous with persons of Mexican descent in Hidalgo County.

5. The grand jury "list" refers to the 15-20 persons selected by the jury commissioners from whom a grand jury panel of 12 is selected. See fn. 7.

6. The grand jury list prepared in the term Partida was indicted was 50% Mexican-American while the panel itself was 40%. The disparities were 29.2% and 39.2% respectively.

Respondent then had the burden to rebut petitioner's statistical presentation. It is at this juncture that we disagree with the district court.

[5] Respondent's rebuttal evidence was limited to the testimony of State District Judge Alamia, who selected the grand jury commissioners, who selected the grand jury who indicted petitioner.[7] Judge Alamia offered no explanation for the disparity. Indeed, he testified that he sought a balance of grand jury commissioners according to ethnic origin, race, sex and age, yet did not instruct the commissioners to do the same. In addition, he admitted that the grand jury selection process has not resulted in ethnically-representative grand jury panels.

[6] In addition to Judge Alamia's testimony, the district court based its decision on the "governing majority" status of Mexican-Americans in Hidalgo County.[8] He reasoned that Mexican-Americans in such a position would not purposefully and intentionally discriminate against themselves.

7. This bit of verbal gymnastics exemplifies the organization of the Texas grand jury system. A state district judge appoints not less than three nor more than five jury commissioners, who must be residents of different portions of the county and must not have served previously in the same year. Art. 19.01. They, in turn, select not less than 15 nor more than 20 persons "from the citizens of different portions of the county" as grand jurors. Art. 19.06, who, among other things, must be able to read and write and must be of sound mind and good moral character. Art. 19.08. The 15-20 persons are "tested," Art. 19.21, and they are "interrogated," Art. 19.22, by being asked prescribed questions, Art. 19.23. Then 12 of them are impaneled by the district judge as the grand jury. Art. 19.26.

8. "Here, 80% of the population is Mexican-American, the majority of the voting population is Mexican-American, the majority of the elected officials are Mexican-American, the majority of the judges and jury commissioners are also Mexican-American, and Mexican-Americans in significant percentages have served on every grand jury in the last ten years." Memorandum Opinion of District Court, p. 18.

Therefore, the discriminatory intent presumed by petitioner's *prima facie* case was overcome. We cannot agree. The fact of governing majority status may mollify the *prima facie* case, but it does not nullify it. This may be done only by proof to explain the disparity. Without it, petitioner must prevail.

[7] While the Texas system of selecting grand jurors is constitutional, *Smith v. Texas*, 1940, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84; *Brooks v. Beto*, 5 Cir. 1966, 366 F.2d 1, the unbridled discretion afforded the jury commissioners to prepare the grand jury list requires close scrutiny of the disparities and the proof offered to explain them. Here, the disparities are too great and the proof offered too paltry.

The district court's judgment is reversed and the case is remanded for further proceedings consistent with this opinion.[9]

Reversed and remanded.

9. We do not suggest that proportional representation or some percentage approximating it is required to survive constitutional attack. Cf. *Swain v. Alabama*, 1965, 380 U.S. 202, 208-09, 85 S.Ct. 824, 13 L.Ed.2d 759. The unexplained disparities here are simply too great and too long existent for the county system to escape unrectified.

APPENDIX "B"

Rodrigo PARTIDA

v.

Claudio CASTANEDA, Sheriff.

Civ. A. No. 74-B-50.

UNITED STATES DISTRICT COURT,

S. D. Texas,

Brownsville Division.

Oct. 26, 1974.

Proceeding on petition by Texas prisoner for federal writ of habeas corpus claiming discrimination in selection of grand jurors which returned indictment against him. The District Court, Garza, J., held that while petitioner had proven a bare prima facie case of discrimination in selection of grand jurors, the case has been rebutted by evidence produced by the state.

Petition for writ denied and cause dismissed.

ACLU Foundation—South Texas Project, David G. Hall, San Juan, Tex., for petitioner.

Oscar McInnis, Crim. Dist. Atty. of Hidalgo County, Edinburg, Tex., for respondent.

MEMORANDUM

GARZA, District Judge.

After exhausting all available state remedies, the Petitioner, Rodrigo Partida, filed this Petition for Writ of Habeas Corpus with the United States District Court, Southern District of Texas, naming Claudio Castaneda, the Sheriff of Hidalgo County, Texas, as Respondent. Petitioner alleges he has been denied due process and equal protection of the laws under the Fourteenth Amendment to the Constitution, because Mexican-Americans were significantly under-represented on the state grand jury that indicted him, as a result of a long continued system of underrepresentation in the particular jurisdiction where he was tried. The District Attorney for Hidalgo County filed the answer for the Respondent which asserts that the Petitioner has waived his right to claim racial discrimination because Petitioner failed to raise his claim prior to trial. It is further asserted that the Texas Court of Criminal Appeals was correct in holding Petitioner failed to establish his claim that he had been denied his constitutional rights because of a long continued racial underrepresentation on the state grand juries in Hidalgo County. Two issues are presented for decision by this Court. The first issue is whether this Court should hold Petitioner waived his right to object to the composition of the grand jury that indicted him, where the state courts have ignored any waiver provision and considered Petitioner's claim on the merits. The second issue is whether the Petitioner has proven his claim of a long-continued racial underrepresentation in the particular jurisdiction where he was tried and is entitled to relief.

The Petitioner, Rodrigo Partida, was indicted on March 17, 1972, for the offense of burglary of a private residence

at night with intent to commit rape; on December 19, 1972, the Petitioner was found guilty by a jury and sentenced to serve not less than five nor more than eight years in the Texas Department of Corrections. The Petitioner filed a Motion for a New Trial and for the first time raised the issue of the unconstitutional composition of the grand jury that indicted him. Petitioner attempted to prove systematic racial discrimination in the selection of the grand jurors in Hidalgo County by placing in evidence data from the U.S. Census of 1970, which shows that the Mexican-American population of Hidalgo County, as indicated by Mexican-American surnames, was 79.2% of the total population. He further showed that the grand juries for the ten year period from 1962 to 1972, when he was indicted, were composed of 39% Mexican-American surnamed jurors. These figures illustrate the existence of a 40.2% disparity between the percentage Petitioner's ethnic group constituted of the total population, and the percentage which his ethnic group constituted of the jury lists actually compiled. Petitioner's Motion for New Trial was overruled and he appealed to the Texas Court of Criminal Appeals, the highest state appellate court on criminal matters. The Texas Court of Criminal Appeals considered the untimely presented point of error and held that the Petitioner had failed to carry his burden of establishing a *prima facie* case of jury discrimination and therefore, affirmed his conviction. Partida v. State of Texas, 506 S.W.2d 209 (Tex. Cr. App. 1974). The Texas Court of Criminal Appeals held that even though Petitioner did show a substantial underrepresentation of Mexican-Americans on the grand jury, he failed to show:

> ". . . that the females who served on grand juries were not of Mexican-American descent but married

to husbands with Anglo-American surnames. He did not show how many persons with Mexican-American surnames or of Mexican-American descent were summoned for grand jury duty and were excused for age, health or other legal reasons. . . How many of those listed in the census figures with Mexican-American names were not citizens of the state, but were so-called 'wet-backs' from the south side of the Rio Grande; how many were migrant workers and not residents of Hidalgo County; how many were illiterate and could not read and write; how many were not of sound mind and good moral character; how many had been convicted of a felony or were under indictment or legal accusation for theft or a felony; none of these facts appear in the record. Their absence renders the disparity of the percentages of little force or effect."

As further evidence of the lack of purposeful discrimination, the Texas Court of Criminal Appeals noted that the record showed that the Judge who presided at the trial and summoned the jury commissioners had a Mexican-American surname; that three of the five jury commissioners that he summoned had Mexican-American surnames; that ten of the twenty members of the grand jury array had Mexican-American surnames; that five of the twelve grand jurors that indicted Petitioner had Mexican-American surnames, probably because four of the original members of the array who were Mexican-Americans could not be located; that the foreman who signed the grand jury indictment had a Mexican-American surname; that seven of the twelve petit jurors that found Petitioner guilty had Mexican-American surnames.

After Petitioner's appeal had been denied, he filed his Petition for Writ of Habeas Corpus in this Court. Petitioner alleges he has been denied due process of law and equal protection of the law under the Fourteenth Amendment to the Constitution, because of the ethnic underrepresentation in the state grand jury which indicted him, which defect constitutes a denial of a fundamental right and may be raised for the first time in a Motion for New Trial; that he did not knowingly and intentionally waive his right to challenge the composition of the grand jury because his court appointed counsel did not inform him that such right existed; that he was an indigent at the time of his indictment and was unrepresented by counsel at this "critical stage", which, according to the Texas statutory and court fashioned rules, is the stage when Petitioner must challenge the array or be barred from asserting his challenge; that the Texas statutes do not provide for his particular constitutional challenge and, therefore, he could not have waived it, since it did not exist; that the highest state appellate court on criminal matters considered the constitutional challenge and, therefore, he could not have waived it, since it did not exist; that the highest state appellate court on criminal matters considered the constitutional challenge and, therefore, ignored the waiver provisions, if any existed; that the highest criminal appellate court in the state applied the wrong burden of proof and completely misunderstood the requisites of a constitutional attack based on ethnic discrimination in the selection of the grand jury. The state answers that the Petitioner did waive his challenge to the ethnic composition of the grand jury and he did not establish a *prima facie* case of discrimination.

[1,2] Since the waiver issue is potentially dispositive of the entire case, it will be considered first. Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides:

> ". . . objections based on defects in the institution of the prosecution or in the indictment . . . may be raised *only by* motion *before trial* . . . failure . . . constitutes a waiver . . . but the court for cause shown may grant relief from the waiver." (Emphasis supplied.)

In Davis v. United States, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973), this rule was held to apply to both procedural and constitutional defects in the institution of prosecutions which do not affect the Court's jurisdiction. The policy reasons for the rule, as so clearly stated by the *Davis* Court, are:

> "If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult."

Davis clearly establishes the rule that once an objection to the institution of the prosecution is waived, it cannot later be resurrected, either in direct criminal proceedings or in federal habeas corpus, unless cause is shown. If cause is shown, then a new trial will be granted so that an indictment can be returned by a properly constituted grand jury. Nothing in the previous trial need be redone;

the prosecution will be allowed to present its entire case through the testimony given at the previous trial, if it is shown that its witnesses are unavailable. Under this procedure, the state will only lose the enhancement of credibility that the actual presence of witnesses will lend to their testimony. Several factors should be considered in determining whether there is sufficient cause to grant relief from any waiver suffered by the complainant.

[3] In determining if cause exists, the Court should consider whether the case against the Petitioner is a strong one or weak one, if the case is a weak one, then it is probable a properly composed grand jury would have found that probable cause did not exist and would not have bound the defendant over for trial; whether the facts concerning the selection of the grand jury were notorious and available to the Petitioner in the exercise of due diligence before trial, if the facts were known it increases the likelihood of a tacit but intentional waiver or intentional tactical decision; considerations of credibility require an examination of how much the state will lose because certain key witnesses are no longer available; judicial economy requires examination of the seriousness of clogging dockets by empaneling new grand and petit juries to re-indict and re-try the defendant; whether upsetting prior convictions will effect enhancement laws; whether any actual prejudice resulted to the defendant from the discriminatory selection of the grand jury, for example, were the two white accomplices set free but the black man bound over for trial. Davis v. United States, *supra* (strength of evidence of guilt—facts of selection notorious—loss of credibility on retrial); Newman v. Henderson, 496 F.2d 896, 898 (CA 5 1974) (actual prejudice). Reliance on pre-*Davis* cases is not "cause" and will not

excuse Petitioner from his failure to timely assert his claim in the trial court. Morris v. Sullivan, 497 F.2d 544 (CA 5 1974).

Factually the law announced in *Davis* can be limited to a Motion to Vacate brought pursuant to § 2255, but the Fifth Circuit has chosen not to circumscribe the *Davis* holding and has held that it applies to state prisoners bringing habeas corpus pursuant to § 2254. Hairston v. Cox, 361 F.Supp. 1180 (W.D.Va.1973); Morris v. Sullivan, *supra*; Newman v. Henderson, *supra*; Jones v. Henderson, 494 F.2d 47 (CA 5 1974); Rivera v. Wainwright, 488 F.2d 275 (CA 5 1974); Marlin v. Florida, 489 F.2d 702 (CA 5 1974).

[4-8] Pre-*Davis*, the rule in this Circuit was that a jury discrimination claim barred by a state procedural timeliness rule, like the Texas rule, could be presented for the first time in federal habeas corpus unless the state proved deliberate bypass or knowing waiver. Post-*Davis,* this Circuit has consistently held that the *Davis* rule is applicable to state grand jury claims and it is the responsibility of the petitioner to show facts and circumstances justifying relief from the waiver. Morris v. Sullivan, *supra.* In *Morris,* it was held that a state's court-fashioned procedural waiver rule should be given the same effect as Rule 12(b)(2). In Valadez v. State, 408 S.W.2d 109 (Tex.Cr.App.1966), the Texas Court of Criminal Appeals held that if the defendant did not timely assert his objection to the grand jury, he would be held to have waived his claim. Ever since Hendandez v. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954), it has been held that a Texas grand jury can be attacked for purposeful exclusion of Mexican-Americans. The case of Muniz v. Beto, 434 F.2d 697 (CA 5, 1970), cited by Petitioner,

can be distinguished because at the time Petitioner was there indicted, *Hernandez* had not been decided and Texas did not recognize this constitutional claim as a ground for challenge. It now seems apparent that under established Texas law, a defendant can object to a grand jury because of purposeful exclusion of Mexican-Americans, and this objection can be waived if the defendant fails to timely assert it. It is now equally clear that the federal courts will give the same effect to the state waiver rule as it will give to Rule 12(b)(2), Fed.R.Crim.P., waiver rule. The standard for the application of this rule was expressed in Rivera v. Wainwright, *supra:*

> "If this waiver meets federal constitutional standards then the petitioner would be precluded from asserting his present claim in this federal habeas corpus proceeding."

Similarly, if the state law does not provide for a procedure to give relief from the waiver, the federal courts will engraft a "cause shown" exception on the state rule and make an independent determination of whether such cause exists. Newman v. Henderson, *supra.* The rationale for this holding is evident; a state prisoner should not stand in a better position than a federal prisoner who would be held to have waived his objection under Rule 12(b)(2). Newman v. Henderson, *supra.*

[9, 10] This Court, however, does not feel that *Davis* is dispositive of the factual situation present in this case. Here, the highest state court on criminal matters has chosen to ignore its own waiver provisions and consider the merits of Petitioner's constitutional claim. Where the state courts have ignored their own waiver provisions and considered the merits of a constitutional claim, a federal

court is not constrained from also considering the merits of the constitutional claim, even though it may have been waived under the federal rules. In this situation it is well settled that the federal courts will also reach the merits in the absence of an intentional waiver or deliberate bypass. Hale v. Henderson, 485 F.2d 266, 269 (CA 6 1973); Coleman v. Alabama, 377 U.S. 129, 84 S.Ct. 1152, 12 L.Ed.2d 190 (1964); Warden v. Hayden, 387 U.S. 294, 297 n. 3, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); Irvin v. Dowd, 359 U.S. 394, 406, 79 S.Ct. 825, 3 L.Ed.2d 900 (1959); Brown v. Allen, 344 U.S. 443, 486, 73 S.Ct. 397, 97 L.Ed. 469 (1953); Herndon v. Lowry, 301 U.S. 242, 247, 57 S.Ct. 732, 81 L.Ed. 1066 (1937); Fay v. Nola, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Having held that Petitioner did not waive his right to present his claim of discriminatory jury selection, it is not necessary to determine at what stage the Texas court-made waiver provision is effective or whether any such provision would make that state a "critical stage" at which the defendant must be represented by counsel.

This Court turns next to a consideration of Petitioner's claim that he has been denied equal protection of the laws because of the long-continued systematic underrepresentation of Mexican-Americans on the grand jury panels in Hidalgo County.

[11] The standard that has evolved under the due process and equal protection clauses of the Constitution during the ninety years since Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1879), is that an indictment returned against a member of a "distinct group" cannot stand if members of this "distinct group" have been sys-

tematically and intentionally discriminated against in the selection of the grand jury. As eloquently expressed by Chief Justice Warren in Hernandez v. Texas, *supra*:

> "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a *distinct class* is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and 'Negro'." (Emphasis supplied.)

A conviction based upon such a constitutionally defective indictment will also be set aside regardless of strong evidence of guilt or lack of objection to the composition of the petit jury that finds the defendant guilty. Pierre v. State of Louisiana, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939); Hill v. State of Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942); Labat v. Bennett, 365 F.2d 698 (5 Cir. 1966). This does not mean, however, that the accused will be set free, since the state may choose to re-indict and re-try him after the constitutional error has been corrected. Hill v. Texas, *supra;* Patton v. Mississippi, 332 U.S. 463, 469, 68 S.Ct. 184, 92 L.Ed. 76 (1947); Swain v. Alabama, 380 U.S. 202, 247, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); Whitus v. Georgia,

385 U.S. 545, 550, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967).

[12] The person claiming the systematic and intentional discrimination in the selection of the grand jury has the burden of providing a *prima facie* case, but once it is proven, tthe burden shifts to the state and it will be held responsible for any factual vacuum. Avery v. Georgia, 345 U.S. 559, 562, 73 S.Ct. 891, 97 L.Ed. 1224 (1953). Patton v. Mississippi, *supra;* Muniz v. Beto, *supra*. The reason for this rule is:

> "It is designed to operate in jury cases so that once the defendant has made a showing of total exclusion, the burden of going forward with the evidence is placed upon the State, the party in the better position to develop the facts as to how the exclusion came about. The defendant is a party to one proceeding only, and his access to relevant evidence is obviously limited. The State is a party to all criminal cases and has greater access to the evidence, if any, which would tend to negative the State's involvement in discriminatory jury selection." Swain v. Alabama, *supra,* at 240, 85 S.Ct. at 846.
>
> "Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it." Pierre v. Louisiana, *supra,* at 362, 59 S.Ct. at 540.

[13] To establish a *prima facie* case of invidious discrimination, the Petitioner must first show a discriminatory result by proving a marked disparity between the percentage which the "district group" constitutes among the potentially eligible jurors and the percentages which the "district group" constitutes among the jury list actually

compiled by the jury commissioners. Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); Jones v. Georgia, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967); Sims v. Georgia, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967); Muniz v. Beto, *supra;* Singleton v. Estelle, 492 F.2d 671, 677 (1974); Gibson v. Blair, 467 F.2d 842, 844 (1972).

After proving a discriminatory result, the Petitioner must further prove this result was accompanied by some particular discriminatory act or failure to act; or accompanied by token inclusion or total exclusion; or accompanied by a jury selection system containing a significant danger of abuse; or by proving that the discriminatory result was representative of the results obtained in a history of cases in the particular jurisdiction in which the trial occurred, this being strong circumstantial evidence of discriminatory jury selection. Singleton v. Estelle, *supra;* Smith v. Texas, 311 U.S. 128, 132, 61 S.Ct. 164, 85 L.Ed. 84 (1940) (failure to act—conscious ignorance); Hill v. Texas, *supra* (failure to act—conscious ignorance); Alexander v. Louisiana, 405 U.S. 625, 630, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972) (racial designation on questionnaire—significant danger of abuse); Avery v. Georgia, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953) (racial designation on jury cards—significant danger of abuse); Whitus v. Georgia, *supra* (racial designation on tax list—significant danger of abuse); Norris v. Alabama, *supra,* (total exclusion of Negroes from grand juries and petit juries); Brown v. Allen, *supra* (token inclusion of Negroes on grand and petit juries); Patton v. Mississippi, *supra* (history of discriminatory results); Muniz v. Beto, *supra* (history of discriminatory results); Gibson v. Blair, *supra* (history of discriminatory results).

The "Rule of Exclusion" is an evidentiary rule to facilitate the Petitioner in establishing his *prima facie* case of intentional discrimination where evidence of intent is otherwise wanting. Brooks v. Beto, 366 F.2d 1 (CA 5 1966). Under this rule a *prima facie* case can be established, as done in the case before the Court, by showing a long-continued and unexplained disparity.

A disparity great enough to establish a *prima facie* case of discriminatory jury selection will depend on the facts of each case, but an examination of a few recent cases will give an indication of the outer perimeters. In Black v. Curb, 464 F.2d 165 (CA 5 1972), 69% of the total population was Negro, 60% were potentially eligible, yet only 35% of the potential jurors on the jury list were Negro, causing a 25% disparity. The Court indicated this discriminatory result flowed from the fact that the jury commissioners disqualified large numbers of Negroes because they were unknown to the jury commissioners. Failure of jury commissioners to inform themselves of the qualifications of members of minority groups has long been held to be a form of discriminatory jury selection. It should be noted that Negroes constituted a majority of the population, but they were not a *governing* majority even though there was significant inclusion on both grand and petit juries. In Turner v. Fouche, 396 U.S. 346, 359, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), 60% of the total population was Negro, yet only 37% of the jurors on the jury list were Negro, causing a 23% disparity. The Court indicated that this discriminatory result flowed from the fact that the jury commissioners purged a great number of Negroes from the voter lists because they "lacked intelligence" or "uprightness" and were, therefore, disqualified. While Negroes again constituted a majority, they

were not a *governing* majority and were significantly underrepresented in all the government of the county. In Pullum v. Greene, 396 F.2d 251 (CA 5 1968), 55.5% of the total population was Negro, yet only 17.9% of the jury list were Negro, causing a 37.6% disparity. The Court indicated that this discriminatory result flowed from the fact that the selection system contained an inherent danger of abuse, since the jury lists were drawn from segregated tax lists and there was evidence that the jury commissioners failed to familiarize themselves with the community, especially with the previously excluded minority group. In this county in Georgia, there was a long history of total exclusion of Negroes from the jury lists and they clearly were a *non-governing* majority. Salary v. Wilson, 415 F.2d 467 (CA 5 1969), is another case cited by Petitioner where Negroes were a majority of the population. There, Negroes constituted 55% of the total population, yet only 12.9% of the jurors on the jury list were Negro. The Court indicated that this discriminatory result flowed from the fact the jury commissioners failed to familiarize themselves with the Negro population, which again was a *non-governing* majority. Even though Negroes constituted a majority of the population and were significantly included in the grand jury lists, they were still underrepresented on the grand jury list, and it was held they had established their *prima facie* case. In all of these cases, the excluded group was not a *governing* majority, and the Court found some evidence that discrimination had occurred besides circumstantially through evidence of a long continued disparity. The Court found either total exclusion, token inclusion, some discriminatory act, failure of jury commissioners to inform themselves of qualified members of the community, or found some defect in the selection system.

In Swain v. Alabama, *supra,* 26% of the potentially eligible population was Negro, yet only 10%-15% of the jurors on the jury list were Negroes. The Court held:

> "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%. (Citations omitted). Here the commissioners denied that racial considerations entered into their selections of either their contacts in the community or the names of prospective jurors. There is no evidence that the commissioners applied different standards of qualifications to the Negro community than they did to the white community. Nor was there any meaningful attempt to demonstrate that the same proportion of Negroes qualified under the standards being administered by the commissioners. It is not clear from the record that the commissioners even knew how many Negroes were in their respective areas, or on the jury roll or on the venires drawn from the jury box. The overall percentage disparity has been small, and reflects no studied attempt to include or exclude a specified number of Negroes. Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think that the burden of proof was carried by petitioner in this case."

In Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950), 15.5% of the total population was Negro, yet only 6.7% of the jurors on the jury list were Negro. The Court said this disproportion was not enough to establish a *prima facie* case, since it appeared from the record that not all Negroes in the county were eligible.

When this disproportion was considered with the evidence of the failure of the jury commissioners to famaliarize themselves with qualified members of the excluded group, it was held sufficient to establish a *prima facie* case.

[14, 15] These cases are illustrative because they show that the percentage disparity required to establish a *prima facie* case will vary according to a great number of factors. For example, a greater percentage of disproportion is permissible when Petitioner bases his disproportion on total population instead of eligible population. The reason is that it will be presumed that a substantial number of the distinct group are eligible, but it will not be presumed that all members of the group are eligible. It would seem that a greater percentage of deviation is permitted where there is no evidence of a discriminatory act or failure to act, token inclusion, total exclusion, inherently dangerous jury selection system, or a long history of discriminatory results. The reason this should be is that the Court must presume that some defect in the system caused the discriminatory result, but where a defect is shown, then it is only necessary to presume the "nexus" between the defect and the discriminatory result. The amount of inclusion is also to be considered, as well as whether the selection process used reflected a studied attempt at discrimination or was merely haphazard or inadvertent in its failure to ensure all groups in the community were fully represented and also whether the group excluded was a majority or *governing* majority. In determining whether a *prima facie* case of discriminatory jury selection has been established, the Court must examine the entire record and take into account all possible explanations. As clearly stated in Alexander v. Louisiana, *supra*:

> "This Court has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account *all possible explanatory factors.*" (Emphasis supplied.)

[16] This Court is aware that the state has the burden of rebutting the Petitioner's *prima facie* case once it has been established, but bias and prejudice are not easily inferred and he must present clear evidence of discriminatory jury selection. Mere allegations alone are not enough. The Court cannot presume a case without some evidence that it, in fact, exists; therefore, the *prima facie* case must depend on the basic correctness of the percentages aided by certain allowable presumptions; the Court is not bound by percentages which are on their face incorrect. The state appellate court incorrectly placed the burden of proof on the Petitioner, but the basic accuracy of his percentages must be considered before this Court can determine if his *prima facie* case has been rebutted by the evidence that the state has presented. The Petitioner's disproportion in the present case is not as great as it seemed at first blush.

He has compared the jury lists with the total population instead of with jury eligibles which inflates the disproportion. While it can be presumed that a substantial portion of the total Mexican-American population is eligible, it must be remembered that this area is unique in that it has a larger ineligible migrant and illegal alien population than other areas. From Petitioner's own evidence, it appears that the percentage of drop-outs before the fifth grade is greater among the Hidalgo County Mexican-American population than is the state-wide percentage

among the Mexican-American population. This further indicates that the percentage variation between jury eligibles and total population may be greater in Hidalgo County area than in other areas of the state, because Hidalgo County would have a larger percentage of illiterates. Hunt v. United States, 400 F.2d 306 (CA 5 1968); United States v. Hyde, 448 F.2d 815 (CA 5 1971).

It is clear that in a rapidly changing area a disproportion can be inflated by including too many prior years when representation was even more disparate. The evidence shows that the disproportion was on the decrease in the two years prior to Petitioner's indictment, and the grand jury array was composed of about 45.5% Mexican-Americans, reducing the disparity to 33.7% instead of the alleged 39% disparity. Due to the rapid growth in this area, a percentage comparison should not be carried back too many years, because it will distort the disproportion.

[17] It is true that some disproportion exists, but the Fifth Circuit recently reaffirmed the doctrine that the Constitution only requires a jury represent a fair cross section of the community; it does not require that the jury mirror the percentage composition of the community. Grech v. Wainwright, 492 F.2d 747 (CA 5 1974). This Court must, therefore, determine whether the disproportion is marked enough to *indicate* that discrimination has occurred. As aptly stated in Akins v. Texas, 325 U.S. 398 at 403, 65 S.Ct. 1276 at 1279, 89 L.Ed. 1692 (1945):

> "Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion *indicated*

discrimination and not on the theory that racial groups must be recognized." (Emphasis supplied.)

[18] The Fifth Circuit has held that when the subjective element enters into the selection process, the percentage variation allowable in *Swain, supra,* could be disregarded and an even narrower range might be required. Thompson v. Sheppard, 490 F.2d 830 (CA 5 1974). Three out of five jury commissioners in the present case were Mexican-Americans, and the Texas system allows the subjective element to enter into its jury selection process; therefore, it would seem that a broader range of variation should be allowed where the "distinct group" allegedly underrepresented is Mexican-American. If people in charge can choose whom they want, it is unlikely they will discriminate against themselves. A broader range of variation should be tolerated here, because the Texas selection system allows the *governing* majority to favor their group when selecting grand jurors.

[19] Following the traditional guidelines set out by the courts for proving racial discrimination in the selection of the grand jury, the Petitioner has established a *bare prima facie* case by proving a long continued disproportion in the composition of the grand juries in Hidalgo County, but this Court holds that it has been rebutted.

[20] The Petitioner's percentages appear somewhat inaccurate and the circumstantial evidence of lack of discriminatory intent is strong, yet this Court is asked to presume that the judge and jury commisisoners intentionally discriminated against Mexican-Americans in their selection for the grand jury. The Petitioner did show a long continued history of an alleged disproportion, but there is no evidence of tokenism, total exclusion, discriminatory

acts or failure to act or of an inherently dangerous selection system. It cannot be argued that the jury commissioners failed to inform themselves of the qualifications of Mexican-Americans, because the three Mexican-American commissioners were aware of the qualification of the members of the Mexican-American community, indeed, the other members of the commission also must know these qualifications since they live and work in a community which is almost 80% Mexican-American. It cannot be argued that the judge who selected the commissioners discriminated in his selection. The judge who selected the jury commissioners is a Mexican-American, and he testified he based his selection primarily on geographic considerations, trying to select one commissioner from each precinct in Hidalgo County. While it is clearly established law that the uncorroborated testimony of the judge or the jury commissioners as to their good intentions will not alone rebut a *prima facie* case, it is some evidence of lack of discriminatory intent. It is possible that the judge chose his commissioners from among the outstanding members of the community and that they then chose members of the array from people they knew who were probably on the same socio-economic level. Petitioner's evidence shows that Mexican-Americans are underrepresented at the higher socio-economic level, and this social anomaly could result in an inadvertent disproportion in the grand jury. The jury commissioners, however, chose from the higher socio-economic level because of the natural tendency to prefer their friends and business associates, not because they were unaware of the racial composition of the community, and this is not an act of intentional discrimination.

The Court must also consider the demographic composition of the community. Percentages not tolerated in a more rarified atmosphere may be acceptable in other areas. The demographic composition of the community involved in the present case is markedly different from that usually considered; therefore, those cases on which Petitioner relies are factually distinguishable from the present case.

Generally the "distinct group" excluded in the cited cases was not a *governing* majority as it is here. Here, 80% of the population is Mexican-American, the majority of the voting population is Mexican-American, the majority of the elected officials are Mexican-American, the majority of the judges and jury commissioners are also Mexican-American, and Mexican-Americans in significant percentages have served on every grand jury in the last ten years. At the time of Petitioner's indictment, there were three district courts in Hidalgo County, and two of these had Mexican-American judges. The record in the present case reveals that the judge that appointed the jury commissioners is a Mexican-American, that 60% of the jury commissioners he appointed in the last two years are Mexican-Americans, that 45% of the grand jurors summoned by these commissioners are Mexican-Americans, that 50% of the jurors summoned to serve on the array were Mexican-American, and the foreman that signed the indictment that indicted the Petitioner was a Mexican-American. Since four Mexican-American members of the jury panel could not be served and one that had been served was absent, only 40% of the grand jury that indicted the Petitioner were Mexican-Americans, but this Court refuses to believe that Claudio Castaneda, the elected Mexican-American sheriff of a county where the

majority of the voters are Mexican-American, would purposefully refuse to serve four of the Mexican-American members of the jury panel with the intention of causing a disproportion on the grand jury that indicted the Petitioner. Here, the Mexican-Americans are a *governing* majority, and it cannot be presumed they would purposefully and intentionally discriminate against themselves.

It is true that the Texas selection system is archaic and inefficient in a day that calls for well-oiled judicial machinery. Its potential for abuse is great and it should be replaced by a more expedient process, but it has been upheld by the Supreme Court against repeated Constitutional attack, so its demise must depend upon legislative wisdom and not judicial decree.

By Order of Dismissal entered this date, Petitioner Rodrigo Partida's Petition for Writ of Habeas Corpus will be denied and this cause dismissed.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1975

No. 74-3966

D. C. Docket No. CA-74-B-50

RODRIGO PARTIDA,
Petitioner-Appellant,

versus

CLAUDIO CASTANEDA, Sheriff,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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Before GODBOLD, DYER and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

December 11, 1975

Issued as Mandate:

APPENDIX "D"

UNITED STATES COURT OF APPEALS
Fifth Circuit

OFFICE OF THE CLERK
January 28, 1976

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

TO ALL COUNSEL OF RECORD

RE: No. 74-3966 — Rodrigo Partida v.
Claudio Castaneda

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

by SUSAN M. GROVERS
Deputy Clerk

/smg

cc: Mr. David G. Hall
Mr. Thomas P. Beery
Mr. Oscar B. McInnis

APPENDIX "E"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-3966

RODRIGO PARTIDA,
Petitioner-Appellant,

v.

CLAUDIO CASTANEDA, Sheriff,
Respondent-Appellee.

(Filed March 12, 1976

ON CONSIDERATION OF THE APPLICATION of the appellee in the above numbered and entitled cause for a further stay of the mandate of this Court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is further stayed to and including April 12, 1976, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED

that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

DAVID W. DYER
United States Circuit Judge

Supreme Court, U. S.
FILED
JUL 27 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

NO. 75-1552

CLAUDIO CASTANEDA, SHERIFF,
Petitioner

v.

RODRIGO PARTIDA,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 26, 1976
CERTIORARI GRANTED JUNE 14, 1976

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1552

CLAUDIO CASTANEDA, SHERIFF, *Petitioner*

v.

RODRIGO PARTIDA, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NOTATION

The following items appear in appendices to the Petition for Certiorari at the pages noted and are not reproduced in this Appendix:

	Exhibit
Order Denying Writ of Habeas Corpus and Opinion of the United States District Court	"B"
Opinion of the United States Court of Appeals for the Fifth Circuit	"A"
Judgment of the United States Court of Appeals for the Fifth Circuit	"C"
Order Denying Rehearing En Banc by the United States Court of Appeals for the Fifth Circuit	"D"

CLERK'S DOCKET ENTRIES

Appeal

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

74-B-59

C. Form No. 106A Rev.

TITLE OF CASE	ATTORNEYS
RODRIGO PARTIDA VS. CLAUDIO CASTANEDA, SHERIFF OF HIDALGO COUNTY	For plaintiff: DAVID G. HALL P.O. BOX 1493 SAN JUAN, TEXAS 78589 For defendant: THOMAS P. BEERY, Asst. District Attorney Hidalgo Coun Hidalgo County, Texas

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
5 mailed	Clerk		4/5/74	FORMA PAUPERIS		
			11/5/74	Notice of Appeal		
6 mailed	Marshal				5.00	
			11/15/74	C/D 2-10		5.00
s of Action: Petition Writ Of Habeas Corpus.	Docket fee					
	Witness fees					
on arose at:	Depositions					

BEST COPY AVAILABLE

DATE	PROCEEDINGS	Date Judgm
4/5/74	Leave To File Granted, But in this case only, Signed RGG and filed.	
4/5/74	Petition For Writ Of Habeas Corpus, filed.	1
4/5/74	Memorandum, filed. Signed RGG. c/c to District Atty. of Hidalgo Claudio Castaneda, and David Hall.	2
4/5/74	ORDER OF DISMISSAL, Signed RGG and filed. c/c to District Atty. of Hidalgo and Claudio Castaneda, and David Hall.	3
4/8/74	Petitioner's Application For Certificate Of Probable Cause, filed.	4
4/8/74	Petitioner's Notice Of Appeal, filed.	5
4/15/74	Memorandum And Order, filed. (recommended that Petitioner be released on his original bond or a similar bond until the Court has ruled on his writ of habeas corpus.) c/c mail to Attny General of Texas, District Attny of Hidalgo County, Sheriff of Hidalgo County and Mr. Hall. Hearing set for Friday, June 28, 1974 at 9:30 A.M.	6
5/13/74	Answer To Petition For Writ Of Habeas Corpus, filed.	7
5/17/74	Transcript and Supplemental Transcript of Proceedings Had and Statement of Facts in State Court, filed.	8
5/17/74	Second Supplemental Transcript, filed.	9
5/20/74	Pltf's Motion To Withdraw Notice Of Appeal; filed: M/D 6/10/74	10
6/11/74	Order To Withdraw Notice of Appeal, Signed RGG and filed. c/c to all counsel. jmb	11
6/28/74 6/28/74	Supplemental brief of respondent filed. Petitioner appears with attorney Daivd G. Hall for oral hearing on petition for writ of habeas corpus and under-representation of Mexican-Americans in the Grand Jury of Hidalgo County, Texas at 1:35 p.m. Stipulation entered into the record in ref: to attorney Joe I. Cardenas qualifications. Petitioner offers P-1 Affidavit of Joe Cardenas and P-2, (entire record of proceedings in State Court). Petitioner rests at 1:55 P.M. Respondent offers into evidence R-1, Answer to petitioner's complaint-Respondent's witnesses: 1. Jose Alamia-State District Judge, Hidalgo Co., Texas Oath is waived by all counsel. Mr. McInnis will search for transcript of proceedings of the Grand Jury which indicted Petitioner. Petitioner requests leave to file another brief-request is granted.	12

D. C. 115A Rev. Civil Docket Continuation

DATE	PROCEEDINGS	J
6/28/74	Breifs are to be filed by 8/5/74 and replied by 8/12/74. Petitioner requests a bond be set by this Court. Bond is set at $5,000.00	
7/2/74	Appearance Bond, filed.	1
7/29/74	Reporter Transcript of impanelling of the Grand Jury in 92th District Court, filed.	1
8/6/74	Petitioner's emorandum Brief In Support Of His Petition For Writ Of Habeas Corpus, filed.	1
8/12/74	"District Attorney Oscar McInnis informed the Court that his brief which is due today would be mailed today and the Court agreed to this instead of making them drive to Brownsville to file it this date. Clerk will advise counsel. Reynaldo G. Garza, U. S. District Judge." a/n iw and filed	1
8/14/74	Respondent's Second Supplemental Brief, filed.	1
8/15/74	Petitioner's Motion For Leave To File Reply Brief, filed. M/D 8/19/74	1
8/20/74	Order Granting Leave To File Petitioner's Reply Brief, Signed RGG, filed.	19
8/20/74	Petitioner's Reply Brief, filed.	2
10/26/74	Memorandum, Signed RGG, filed. (Petition for Writ of Habeas Corpus denied.)	2
10/26/74	Order Of Dismissal, Signed RGG, filed. cc w/memorandum to Petitioner, Hall & McInnis	2
11/5/74	Petitioner Notice Of Appeal, filed.	23
11/5/74	Petitioner Application For Certificate of Probable Cause, filed.	24
11/15/74	Stipulation For Temporary Retention Of Record In District Court, filed.	25
11/15/74	Petitioner-Appellant's Designation of Record For Appeal, filed.	2
	Petitioner's Motion 11/20/74 Proceed On Appeal In Forma Pauper	

DATE	PROCEEDINGS	Date Judgm
11/20/74	Certificate of Probable Cause, Signed RGG and filed. c/c to all counsel.	28
11/20/74	Order Granting Leave To Appeal in Forma Pauperis, Signed RGG and filed. c/c to all counsel.	29
11/22/74	Reporter's Transcript of Proceedings, filed.	30

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
BY [signature] Deputy Clerk

[5]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C. A. NO. 74-B-50

RODRIGO PARTIDA,
Petitioner

v.

CLAUDIO CASTANEDA, Sheriff,
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

(Filed April 5, 1974)

Now Comes RODRIGO PARTIDA, hereinafter referred to as Petitioner, and represents to this Court that he is held and confined in the Hidalgo County Jail, at Edinburg, Texas by CLAUDIO CASTANEDA, Sheriff of Hidalgo County, in restraint of his liberty and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, in that:

I.

Petitioner was charged by indictment in Cause No. 11,597 in the 92nd Judicial District Court of Hidalgo County, Texas with the felony offense of burglary of a private residence at night with the intent to commit rape, and was convicted of such charge by a jury on December 19, 1972, and on February 16, 1973 Petitioner was sentenced by the said Court to serve not less than five (5) nor more than eight (8) years in the Texas Department of Corrections.

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II.

Subsequently, Petitioner's court-appointed counsel for the trial of such cause withdrew as his attorney, and the 92nd Judicial District Court appointed David G. Hall as his counsel for the purpose of prosecuting an appeal in Cause No. 11,597.

III.

Thereafter the Petitioner appealed the conviction in said cause to the Court of Criminal Appeals of the State of Texas, the same being No. 47,743 on the docket of the Court of Criminal Appeals of the State of Texas.

IV.

The Court of Criminal Appeals of the State of Texas affirmed the judgment of the 92nd Judicial District Court of Hidalgo County, Texas in an opinion rendered on the 6th day of March, 1974, a copy of which opinion is attached hereto and incorporated herein by reference as

Exhibit A. On March 27, 1974, the Court of Criminal Appeals of the State of Texas denied your Petitioner leave to file his Motion For Re-Hearing in such cause.

V.

Upon said denial of his Motion For Leave To File Motion For Re-Hearing and the issuance of the mandate of the Court of Criminal Appeals of the State of Texas, a copy of which is attached hereto and incorporated herein by reference as Exhibit B, Petitioner was placed in custody in the Hidalgo County Jail, Edinburg, Texas, where he is now held.

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VI.

Petitioner has exhausted all of his state remedies, and earnestly urges to this Court that unless it grants its Writ Of Habeas Corpus he will suffer irreparable injury in that he will, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, be taken to the Texas Department of Corrections at Huntsville, Walker County, Texas for incarceration and suffer hardships not contemplated by due process.

VII.

In each and every instance and each and every move above set out, Petitioner sought protection under the Fourteenth Amendment to the Constitution of the United States, and in all instances, raised, presented, and urged his federal constitutional questions relating to his conviction in the courts of the State of Texas.

VIII.

The conviction of Petitioner in the courts of the State of Texas was in denial of due process and equal protection in that the indictment and evidence produced on Petitioner's Amended Motion For New Trial showed the following: that the indictment in Cause No. 11,597 in the 92nd District Court of Hidalgo County, Texas was returned by the Grand Jury for the March Term, 1972 of that court; that at the time that the members of the Grand Jury for the March Term, 1972 were appointed the population of Hidalgo County, Texas was approximately 181,535 persons (United States Census of Population: 1970, Report PC(1)-C45-Texas, Table 119, p. 914); that of the foregoing total population 37,924 are persons with other than a Spanish surname and 143,611 are persons with a Spanish

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surname (Census of Population: 1970, Report PC(1)-C45-Texas, Table 129, p. 1092); that virtually all of the persons bearing a Spanish surname in Hidalgo County are persons of Mexican descent; that approximately 79.2% of the population of Hidalgo County, Texas is of Mexican descent; that such persons of Mexican descent are citizens of the United States and of the State of Texas and fully meet the requirements of the Constitution and Laws of the State of Texas for service as grand jurors; that notwithstanding the qualifications of the persons of Mexican descent who live and reside in Hidalgo County, Texas, the grand jury commissioners of such county have selected 531 non-Spanish surnamed persons for potential service as grand jurors during the period from January 1,

1962 through March 17, 1972 and have selected only 339 persons bearing Spanish surnames during the same period; that only approximately 39.0% of the persons selected for potential service as grand jurors by the several grand jury commissions during the last ten years have been persons of Mexican descent; that the Grand Jury Commission empaneled for the purpose of selecting the Grand Jurors for the March, 1972 Term of the 92nd Judicial District Court, which Grand Jury returned the indictment in such cause, selected, named and appointed twenty (20) persons for potential service on such Grand Jury, ten (10) of whom were persons with other than a Spanish surname and ten (10) of whom were persons of Mexican descent; that such long-standing, continuing and systematic exclusion and underrepresentation of Mexican-Americans from the list of grand jurors drawn by the several grand jury commissions is based upon the wholly irrelevant classification of their

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national origin contrary to and in violation of the Constitution and Laws of the United States and of the State of Texas; that such exclusion and underrepresentation of Mexican-Americans from grand jury service upon the arbitrary and unreasonable basis of their national origin has been and is invidiously discriminatory against an identifiable class or group and denies to your Petitioner, a person of Mexican descent, the equal protection and due process of law; that the denial to Petitioner of his right to equal protection in the composition of the grand jury of Hidalgo County, Texas, is a denial of a fundamental right which may be raised for the first time on his Motion For New Trial in the convicting court; that Defendant did not know-

ingly and intentionally waive his right to challenge the composition of the grand jury, for the reason that he was never informed by his court-appointed trial counsel, Mr. Joe Cardenas, that such right existed, as more fully appears from the affidavit of Petitioner attached to his original Motion for New Trial, which appears in the original record developed in the proceedings in the state courts, and the further affidavit of your Petitioner, Rodrigo Partida, attached to Petitioner's original Motion For New Trial, which is also contained in the record in Cause No. 11,597 in the state court.

IX.

A full and complete factual record was developed by the 92nd Judicial District Court of Hidalgo County, Texas upon the hearing held on Petitioner's Amended Motion For New Trial on June 28, 1973, and the existence and availability of such record obviates the necessity of an additional evidentiary hearing before this Court.

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X.

Petitioner was free on bail of $5,000 pending appeal to the Court of Criminal Appeals of the State of Texas, and prays that pending the hearing on this writ he be freed on bail in the sum of $5,000, or such other amount as this Court may deem reasonable and just.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that a Writ of Habeas Corpus issue to the Hon. Claudio Castaneda, Sheriff of Hidalgo County, Texas, commanding him to produce the person of Petitioner before Your

Honor, at a time and place certain, and to show cause, if any he has, why he is so illegally holding him in restraint of his liberties; and in the meantime, that bail be fixed in accordance with the pleadings here presented.

Respectfully submitted,

RODRIGO PARTIDA
Rodrigo Partida, Petitioner

STATE OF TEXAS §
§ VERIFICATION
COUNTY OF HIDALGO §

Before me, the undersigned Notary Public in and for Hidalgo County, Texas, personally appeared RODRIGO PARTIDA, Petitioner in the above entitled and numbered cause, and upon being here and now duly sworn, deposes and says that he has read the foregoing Petition For Writ Of Habeas Corpus, that he is familiar with the contents thereof, and that all things therein are true and correct. Signed the 2nd day of April, 1974.

S. FERNANDEZ
Notary Public in and for
Hidalgo County, Texas

My commission expires
June 1, 1975.

[11]

MEMORANDUM AND ORDER

(Caption Omitted)

(Filed April 15, 1974)

On April 5, 1974, this Court filed its Memorandum and Order of Dismissal in the above entitled and numbered cause, in which Petitioner Rodrigo Partida sought a writ of habeas corpus.

David G. Hall, an attorney for the American Civil Liberties Union, has called attention to the Court to the case of *Muniz v. Beto,* 434 F.2d 697 (5th Cir. 1970). Under the authority of that case, this Court now finds that it should not adopt the findings of fact and conclusions of law expressed in the opinion of the Court of Criminal Appeals, since Petitioner, in his State writ of habeas corpus petition, presented sufficient evidence to shift the burden of proving a systematic under-representation of Mexican-Americans in the Grand Juries of Hidalgo County, Texas, on the State of Texas.

Therefore, this Court is withdrawing its Memorandum of April 5, 1974, and setting aside its Order of Dismissal and re-instating this cause of action.

The Clerk will send copies of Petitioner's application for the writ to the Attorney General of the State of Texas, the

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District Attorney of Hidalgo County, Texas, and Sheriff Claudio Castaneda of Hidalgo County, Texas, who will

within thirty (30) days file an answer and a transcript of all proceedings had in the case of Rodrigo Partida.

A hearing is hereby set to receive evidence for Friday, June 28, 1974, at 9:30 a.m.

It is recommended to the District Attorney and the Sheriff of Hidalgo County that Petitioner Rodrigo Partida be released on his original bond or a similar bond, until this Court has ruled on his Petition for writ of habeas corpus. If this suggestion is not followed, the attorney for the Petitioner can seek further relief from this Court in this regard.

A copy of this Order shall be served by the Clerk with a copy of the Petition for writ of habeas corpus.

DONE at Brownsville, Texas, this 15th day of April, 1974.

REYNALDO G. GARZA
Reynaldo G. Garza
United States District Judge

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ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

(Caption Omitted)

(Filed April 16, 1974)

To The Honorable Judge Of The United States . . . . . District Court For The Southern District Of Texas:

In response to your Honor's Writ of Habeas Corpus, I respectfully state that it is true that I have in my custody and under my restraint the said Rodrigo Partida, according to the statement in his Petition. I took and now have the said Rodrigo Partida by virtue of the Mandate of the Court of Criminal Appeals of the State of Texas, issued March 29, 1974, a certified copy of which is attached hereto as a part of this Answer and marked "Exhibit A". I also now bring before your Honor, in obedience to your Honor's order, the person of the said Rodrigo Partida.

CLAUDIO CASTANEDA
Claudio Castaneda, Sheriff of
Hidalgo County, Texas

SWORN TO AND SUBSCRIBED BEFORE ME this the 7th day of May, 1974.

LINDA E. JACKSON
Notary Public in and for
Hidalgo County, Texas

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"EXHIBIT A"

THE STATE OF TEXAS,

TRIAL COURT NO. 11597

THE STATE OF TEXAS

TO THE 92nd. Judicial District Court of Hidalgo County — GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 27th day of March A.D. 1974, the cause upon appeal to revise or reverse your Judgment between Rodrigo Partida, Appellant, No. 47,743 v. The State of Texas, Appellee, was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

Leave to file appellant's motion for rehearing denied.

WHEREFORE, we command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 29th day of March A.D. 1974.

GLENN HAYNES, Clerk

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HIDALGO COUNTY GRAND JURY PANELS, 1962-1972

Term of Court	Spanish-Surname Jurors	Non-Spanish Surname Jurors	Total
1962			
January	3	13	16
March	6	10	16
May	7	9	16
September	7	9	16
November	7	9	16
1963			
January	7	9	16
March	6	10	16
May*	—	—	—
September	7	9	16
November	3	13	16
1964			
January	4	12	16
March*	—	—	—
May	6	10	16
September	2	14	16
November	7	9	16
1965			
January	5	11	16
March	5	12	17
May	5	11	16
September	4	12	16
November	6	10	16
1966			
January#	—	—	—
March	6	14	20
May	8	12	20
September	8	12	20
November	8	12	20
1967			
January	9	11	20
March	6	15	21
May	4	16	20
September	10	10	20
November*	—	—	—

1968			
January	6	14	20
March	8	12	20
May	6	14	20
September	5	15	20
November	8	12	20
1969			
January	7	13	20
March	11	9	20
May	9	11	20
September	8	12	20
November	15	5	20
1970			
January	7	13	20
March	7	13	20
May	7	13	20
September*	—	—	—
November	11	9	20
1971			
January	8	12	20
March	3	17	20
May	11	9	20
September	11	9	20
November	14	6	20
1972			
January	11	9	20
March	10	10	20
TOTALS:	339, 39.0%	531, 61.0%	870, 100%

* Venire facies not issued and/or envelope not opened
\# Jury Commission not appointed and panel not selected

EXHIBIT A

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DEFENDANT'S EXHIBIT NO. 2

TABLE 1: Median Texas Family Income, By Race

Source: 1970 Census of Population: General Social and Economic Characteristics of Texas, Table 58, Report No. PC(1)-C45, p. 451

*White	$8930
Negro	5334
Spanish language or Spanish surname	5897
TOTAL	8490

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DEFENDANT'S EXHIBIT NO. 3

TABLE 3: Level of School Completed By Texans 25 Years Old And Over, By Race

Source: 1970 Census of Population: General Social and Economic Characteristics of Texas, Table 51, Report No. PC(1)-C45, p. 439

	*White	Black	Spanish lang. or surname	Total Pop.
Less than 5 years elementary school	8.6%	14.6%	33.8%	9.3%
Less than 1 year high school	28.6%	43.6%	61.9%	30.2%
4 years high school or more	49.5%	30.1%	24.7%	47.4%

* The category "White" includes persons of Spanish surname or language.

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DEFENDANT'S EXHIBIT NO. 4

TABLE 2: Texas Families With Income Less Than Poverty Level, By Race

Source: 1970 Census of Population: General Social and Economic Characteristics of Texas, Table 58, Report No. PC(1)-C45, p. 453

*White	12.4%
Negro	32.7%
Spanish language or Spanish surname	31.4%
TOTAL	14.6%

* The category "White" includes persons of Spanish surname or language.

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DEFENDANT'S EXHIBIT NO. 5

TABLE 4: Occupation Of Employed Texans 16 Years Old And Over, By Race, Report No. PC(1)-C45, p. 445

Source: 1970 Census of Population: General Social and Economic Characteristics of Texas, Table 54

	*White	% of White	Negro	% of Negro	Spanish-language, or surname	% of Spanish
Professional, technical & kindred	558,269	15%	34,208	7%	45,411	7%
Managers & administrators, except farm	337,334	9%	10,004	2%	30,232	5%
Laborers, except farm	147,079	4%	53,901	11%	52,372	9%
Farm laborers & farm foremen	70,202	2%	10,764	2%	35,093	6%
Service workers, except private household	343,007	9%	113,336	20%	82,712	14%

* The category "White" includes persons of Spanish surname or language.

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DEFENDANT'S EXHIBIT NO. 6

TABLE 5: Families in McAllen-Pharr-Edinburg SMSA With Incomes Less Than Poverty Level, By Race

Source: Computed from 1970 Census of Population: General Social and Economic Characteristics of Texas, Tables 90, 101. Report No. PC(1)-C45, pp. 598, 741

According to census data, 52.8% of Spanish-language or surname families in the McAllen-Pharr-Edinburg SMSA have income less than poverty level. The corresponding proportion of non-Spanish families is 13.7%.

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DEFENDANT'S EXHIBIT NO. 7

TABLE 6: Level Of School Completed By Males 25 Years Old And Over in McAllen-Pharr-Edinburg SMSA, By Race

Source: Computed from 1970 Census of Population: General Social and Economic Characteristics of Texas, Tables 83, 97. Report No. PC(1)-C45, pp. 507, 689

	Spanish surname or language	Spanish % of	*Non-Spanish	% of Non-Spanish
8 years or less	18,774	73%	2,598	23%
1-4 years high school	4,831	18%	4,738	42%
1-3 year college	1,061	4%	1,832	16%
4 years college or more	971	3%	2,053	19%

* "Non-Spanish" was computed by subtracting "Spanish-surname or language" from total population. Since there are only 97 Negroes included (Table 91), this category is almost completely White.

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DEFENDANT'S EXHIBIT NO. 8

TABLE 7: Occupation Of Employed Persons in McAllen-Pharr-Edinburg SMSA, By Race

Source: Computed from 1970 Census of Population: General Social and Economic Characteristics of Texas, Tables 86, 99. Report No. PC(1)-C-45, pp. 715, 546

	Spanish-language or surname	% of Spanish	*Non-Spanish	% of Non-Spanish
Professional technical & kindred	2,613	7%	3,249	22%
Managers & administrators, except farm	1,988	5%	2,448	17%
Laborers, except farm	2,666	7%	483	3%
Farm laborers & farm foremen	6,584	18%	527	3%
Service workers, except private household	3,762	10%	783	5%

* "Non-Spanish" was computed by subtracting "Spanish surname or language" from total population. Since there are only 119 Negroes included (Table 93), this category is almost completely White.

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DEFENDANT'S EXHIBIT NO. 9

TABLE 8: Value of Owner-Occupied Houses in McAllen-Pharr-Edinburg SMSA, By Race

Source: Computed from 1970 Census of Housing: Metropolitan Housing Characteristics, McAllen-Pharr-Edinburg, Texas, Tables 1, 19 Report No. HC(2)-129, pp. 1, 10

Value of House	Spanish language or surname	% of Spanish	*Non-Spanish	% of Non-Spanish
Less than $5,000	9,279	49%	734	10%
$5,000-$19,999	9,219	48%	5,143	68%
$20,000 or more	517	3%	1,641	22%

* "Non-Spanish" was computed by subtracting "Spanish surname or language" from total population. Since there are only 100 Negro families in the area (Table 95), this category is almost completely White.

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DEFENDANT'S EXHIBIT NO. 10

TABLE 9: Gross Rent Of Renter-Occupied Housing Units in McAllen-Pharr-Edinburg SMSA, By Race.

Source: Computed from 1970 Census of Housing: Metropolitan Housing Characteristics, McAllen-Pharr-Edinburg, Texas, Tables 2, 20. Report No. HC(2)-129, pp. 2, 11

Rent	Spanish language or surname	% of Spanish	*Non-Spanish	% of Non-Spanish
No cash rent	2,129	25%	303	8%
Less than $50	3,733	45%	481	13%
$50 to $149	2,450	29%	2,063	57%
$150 or more	99	1%	798	22%

* "Non-Spanish" was computed by subtracting "Spanish surname or language" from total population. Since there are only 100 Negro families in the area (Table 95), this category is almost completely White.

[25]

ORDER OF DISMISSAL

(Caption Omitted)

(Filed October 26, 1974)

For the reasons stated in the Memorandum entered this date, it is

ORDERED, ADJUDGED and DECREED that the Petition for Writ of Habeas Corpus should be, and the same is hereby, denied, and this cause is hereby dismissed.

The Clerk will send copies of this Order and the attached Memorandum to the Petitioner, his counsel, and to the Criminal District Attorney of Hidalgo County, Texas.

DONE at Brownsville, Texas, this 26th day of October, 1974.

REYNALDO G. GARZA
Reynaldo G. Garza
United States District Judge

[26]

NOTICE OF APPEAL

(Caption Omitted)

Notice is hereby given that RODRIGO PARTIDA, Petitioner in the above entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order dismissing his Petition For Writ Of Habeas Corpus, entered in this proceeding on October 26, 1974.

Dated: November 4, 1974.

DAVID G. HALL
American Civil Liberties Union
Foundation—South Texas Project
P. O. Box 1493
San Juan, Texas 78589
512/787-8171
Attorney for Petitioner

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OSCAR B. McINNIS
Criminal District Attorney
Hidalgo County, Texas

July 25, 1974

Hon. Reynaldo Garza, Judge
United States District Court
Southern District of Texas
Brownsville Division
Brownsville, Texas 78529

RE: Writ of Habeas Corpus
Rodrigo Partida v.
Claudio Castaneda, Sheriff
Civil Action No. 74-B-50

Dear Judge Garza:

As per your request at the recent hearing on the Writ of Habeas Corpus in the above case, I am enclosing herewith a copy of the transcript of the proceedings had when the Grand Jury was impanelled which indicted the Petitioner. In addition thereto, I have attached to the transcript a copy of the Grand Jury list, together with the Sheriff's return thereon. This list has a number of notations on it which pretty well explain why more Mexican-Americans were not on the Grand Jury since several appeared on the original list. Three living in rural areas were not located and the fourth was out of the State. It Appears from the list that the three who were excused were Anglo-Americans. Two of those were excused by the Court before the appearance day and the third, Mr. Faulkner, was excused on the day the Grand Jury was impanelled. The only Mexican-American who mentioned being excused was Mr. Calvillo who, after some discussion with the Court, agreed to serve.

You will note that the list of Grand Jurors contained no street addresses. This has now been corrected. As a result, those placed on the list are now generally located. At any rate, there is nothing in this record to indicate that any discriminatory practices were exercised by anyone in the selection and impanelling of the Grand Jury.

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I am filing the original of the attached transcript with the Clerk of your Court and requesting that it be made a part of the record in the case.

Very truly yours,

OSCAR B. McINNIS
Oscar B. McInnis
Criminal District Attorney
Hidalgo County, Texas

OBM: lr
Encs.
cc: Hon. David Hall
Attorney at Law
P. O. Box 1493
San Juan, Texas 78589

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(Reporter's Note: The following is the impaneling of the Grand Jury held on the 16th day of March, 1972, for the March term, before the Hon. J. R. Alamia, Judge of the 92nd District Court, Hidalgo County, Texas, and the following proceedings were had, to-wit:)

The Court: It looks like we only have thirteen according to the report of the Clerk, and we are supposed to have fourteen present outside of those that were not served and those that were excused because of emergencies. Now, there is only one gentleman that should be here and is not, and perhaps he lives away out in Sullivan City, according to the list, and so, we are not going to wait for him. We have enough to impanel a Grand Jury. Madam Clerk, swear the panel in. Do you have the oath there?

Mrs. McMillon: Yes, sir. Please rise. You and each of you solemnly swear that you will make true answers to such questions as may be propounded to you by the Court or under its direction touching your service and qualifications as a Grand Juror so help you God?

(Reporter's Note: All jurors answered in the affirmative)

The Court: Be seated, please. Are you and each of you a citizen of this State and County and qualified to vote in this county under the constitution and laws of the State of Texas.

(Reporter's Note: All jurors answered in the affirmative.)

The Court: Now, eighteen year olds are also

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qualified to vote, however, the Attorney General tells us that they are not qualified to sit on the jury as yet, and that also includes Grand Juries, and if we have any eighteen year olds, between eighteen and twenty-one, they are qualified to vote but otherwise are not qualified to sit on the jury, and I assume that we do not have any. All right. Now, are you and each of you able to read and write the English language? If there is anyone that is not, please indicate to the Court now. Now, the next two questions that the Court is going to ask you — Of course, I don't believe it will apply to anyone, but should it apply to you, and the Court is not aware of it if it does, but you may convey this information to the Court in private. The questions are as follows: Have you ever been convicted of a felony, and the next question is, are you under indictment or legal accusation for theft or for any felony? And, as I stated, if these questions apply to any of you, you may indicate this to the Court in private. All right. Now, having indicated by your silence that you had a positive answer to all of the questions or a negative answer to those that should be negative, and that you are qualified, the Court will excuse one of you, because we don't need but twelve and we have thirteen, apparently, so the Court will excuse one and naturally will excuse that person that has the most urgent emergency or reason for wanting to be excused, and if you have any such reason, you may indicate it to the Court now. Anyone that feels like they should be excused from Grand Jury service may say so at this time.

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Grand Juror, Mr. Faulkner: Judge, I am a druggist, pharmacist, and on call.

The Court: And, your name?

Grand Juror, Mr. Faulkner: Faulkner.

The Court: I am sorry. Is there anyone else that feels like they should be excused?

Grand Juror, Mr. Calvillo, Jr.: The only thing that I have pending is next week and that is, my father would have heart surgery in Houston and I would like to be gone that particular week. Other than that, I don't have any other thing.

The Court: You told the Court that over the telephone and I asked that you be present. Now, for the benefit of the jurors I might explain to you that being on the Grand Jury is not like a regular petit jury. The Grand Jury sets its own time and hours on days when they want to work. Once you are impaneled you are your own bosses. Now, your foreman can excuse you, or excuse as many as three for any particular reason during any of your deliberations. He must, however, retain a quorum of nine, and naturally, if you have some legitimate reason why you want to be excused during that particular session, you can ask permission of the foreman and he can excuse you. So, that is also one of the privileges that you have as a Grand Juror that you wouldn't have as a Petit Juror, because in a regular Petit Jury you have got to have twelve present and voting at all times and the verdict must be unanimous according to our laws. Now, the Grand

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Jury works a little different. You must have at least nine voting on the bill. And, so, with that explanation, what do you think, Mr. Calvillo? Do you think you can stay?

Grand Juror, Mr. Calvillo, Jr.: I will be glad to serve if I can make some kind of arrangement at that time.

The Court: Now, when is your father having surgery?

Grand Juror, Mr. Calvillo, Jr.: His surgery is scheduled the 22nd at Eight A. M.

The Court: That will be next week.

Grand Juror, Mr. Calvillo, Jr.: Yes, sir.

The Court: You will want to leave ahead of time, naturally, so, how early would you have to leave?

Grand Juror, Mr. Calvillo, Jr.: I would want to be there at least ahead of time, and then, depending on the outcome of the operation as to how long I would want to stay afterwards. I would like to stay there a day or two after that.

The Court: That would mean that you wouldn't be here from Tuesday on through the next week?

Grand Juror, Mr. Calvillo, Jr.: Yes, sir.

The Court: I dare say that — Well, I am not going to try to anticipate just how long the Grand Jury is going to work, because really I don't know. The District At-

torney compiles the load or the number of cases that will be presented to the Grand Jury and I have no way of knowing how many cases he has or how long it will take you to dispose of those cases. That is up to you, because you are your own bosses. So, it is between

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you and Mr. Faulkner. Whoever has the most urgent excuse.

Grand Juror, Mr. Faulkner: Of course, I don't know when I would be called. We own the drug store.

The Court: You are on active duty all the time?

Grand Juror, Mr. Faulkner: Well, semi-active. Will this jury start today?

The Court: The jury starts working today and it may work just this morning, and then, you can say, "Look, boys, we are going to quit and go on home". It is up to you. Of course, you will want to work as long as you are needed, naturally, but you can set your own hours. I really believe, Mr. Calvillo, if you stay that you can be excused during that part of the week.

Grand Juror, Mr. Calvillo, Jr.: All right. That is the way I felt because of the situation and that is the reason I advised the Court previously, and subject to being excused in the event I am called out of town, I will probably be able to get excused.

The Court: How long ahead of time will you know when your case is coming up, Mr. Wallace?

Grand Juror, Mr. Wallace, Jr.: That, I can't say.

The Court: Well, won't the lawyers tell you ahead of time?

Grand Juror, Mr. Wallace, Jr.: Yes, sir, I am sure they will.

The Court: Then, you are in a position where you

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can tell the jury, "Well, look, my case is coming up on the 20th of next month and I would like to be excused".

Grand Juror, Mr. Wallace, Jr.: That is correct.

The Court: By the way, gentlemen, your term is for a period of two months, so you work during the month, and part of the month of March is already overwith, and your term will expire during the latter part of April. Really, the first Monday in May. And, the new term starts then and we will have another Grand Jury after that. Now, the only exception to that is that maybe — Now, I am not saying that this happens, and it hasn't happened in this county except — Well, I don't remember when it has happened, but it could happen, and that would be that you get involved in some lengthy investigation that would justify the Grand Jury requesting the Court to extend your term, which the Court can do at your request. If that would happen, if you were to get involved in some investigation that would justify a lengthy investigation and extend your term ,then, of course, the Court would certainly do it, but that is the only way that your

term can be extended and that is by special request and special permission of the Court. Otherwise, your term will end in April and a new Grand Jury will take over in May. All right. Then, I am going to excuse Mr. Faulkner. You will be excused, sir. All right. Please call out the names of the rest, Madam Clerk.

Mrs. McMillon: As I call your names, please take your seat over here in the jury box. R. R. Cabaza, Jr., Ernest Serviere, Janice R. Holman, Oscar Trevino,

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Rupert Richards, Richard J. Geres, Jose Calvillo, Jr., Grady Bennett, Richard Cortez, Mrs. Scott Toothaker, Richard Martinez, Jr., H. W. Wallace, Jr.

The Court: Do you have the oath?

Mrs. McMillon: No, sir.

The Court: Please rise and take the oath. "You solemnly swear that you will diligently inquire into, and true presentment make, of all such matters and things as shall be given you in charge; the State's counsel, your fellows and your own, you shall keep secret, unless required to disclose the same in the course of a judicial proceeding in which the truth of falsity of evidence given in the grand jury room, in a criminal case, shall be under investigation. You shall present no person from envy, hatred or malice; neither shall you leave any person unpresented for love, fear, favor, affection or hope or reward; but you shall present things truly as they come to your knowl-

edge, according to the best of your understanding, so help you God".

(Reporter's Note: All Jurors answered in the affirmative)

The Court: Be seated, please. All right. Lady and gentlemen—Ladies and gentlemen. I thought I had only one there for a while, but I see two of you. The instructions that the Court will give you will be general in form. If you should seek, or if you should feel that you need further instructions or further advice, you can either seek it from the District Attorney, or whoever will be assisting the District Attorney, or if you see fit and you want to, you can seek any advice or answer to any questions or problems that you might have

from the Court by coming into the courtroom in a body or by request. All right. The general instructions are as follows: Inquire diligently into all offenses of grade of felony of which any of the Grand Jurors may have knowledge, or of which they may be informed by the State's attorney, or any other credible person. Ordinarily you will not need to examine into misdemeanors, although you may do so. No one may be put to trial in this State for an offense of the grade of felony, one which may be punished by death, or by confinement in the penitentiary, except upon a true bill of indictment charging such person with such offense. It is not your function to try the guilt or innocence of an accused; but to ascertain first if there has been committed an offense, then, whether some person is probably guilty of such offense, or would likely be

found guilty if put to trial before a petit jury. Guilt or innocence is the province of a petit jury. In such cases the accused is entitled to representation by counsel, to be confronted by the State's witnesses, to present his own witnesses, to have the case supervised by the trial Court and to have the Court charge the jury upon the law of the case. You will not lightly bring a charge by indictment against a citizen. It carries opprobrium and a stigma. On the other hand you will not hesitate to bring an indictment for this reason if you believe some person is probably guilty, or would likely be found guilty by a petit jury when put to trial according to law. Your deliberations are secret. You will recall that your oath requires you to keep the State's Counsel, your fellows' and your own secret unless required to disclose the same in a judicial proceeding in proper cases.

When deliberating upon voting an indictment, or when taking the vote, none but grand jurors may be present. Neither State's attorney, nor bailiff, nor witness, nor any other person may be present in your room at such time. You may consult the State's attorney from time to time during your proceedings, seeking his advice, his aid in examining witnesses, his services in presenting indictments in proper form after you have voted same, and so forth. You may seek advice of the Court touching any matter before you, but for this purpose, you must go into Court in a body, but you be careful not to divulge the particular accusation that is pending before you. It might be concerning burglary, for instance, but not about any particular burglary. Or, you may propound your question

in writing, and in such case, the Court may give answer in writing. The foreman shall preside. May appoint one or more clerks. The foreman may issue summons, or attachment for witnesses. The foreman will give the oath to each witness before questioning him. The foreman will sign all indictments voted by the Grand Jury. A quorum is nine Grand Jurors. Nine jurors must concur in voting an indictment. In voting an indictment, you will furnish the State's Attorney the necessary data for him to prepare the indictment. All indictments will be delivered by the Foreman to the Judge in open Court. At least nine members of the Grand Jury must be present on such occasion. You may meet and adjourn by majority vote, but you must not adjourn for longer than three days, except by consent of the Court. When you have finished your business

for the present, the Court may recess you for the remainder of this term for recall should business require it. The Court is going to appoint Mr. Oscar Trevino of Edinburg as your Foreman. Now, Ladies and Gentlemen of the Jury, at the last session of the last Grand Jury, the Grand Jury made an informal report to the Court in the form of three reports. Hand written. Those reports were given to the Court at that time and I asked the Foreman whether or not these reports should be made public and they indicated at that time that they were not to be made public. However, later on the Foreman communicated to this Court the fact that they could be at the option of the Court. Now, two of these—there were three, as I am telling you. Two of these reports involve matters which

the Court felt should be further investigated by another Grand Jury, which is this Grand Jury. And, for that reason, the Court did not make them public. I am handing you these two reports now, Mr. Foreman, so you may take it up with your Grand Jury and deliberate on it and make whatever report or investigation the Grand Jury sees fit. Now, you may, of course, again consult with the District Attorney and he will so advise you. Now, the third report—Mr. Bailiff, will you hand the Foreman the report? The third one had to do with some suggestions that they had for the police departments over the county and the Court, rather than make the suggestions public, will refer these suggestions to the Chief of Police of each incorporated city in our county. It didn't have reference to any particular police department. It was just a general suggestion that they should follow, or suggestions, rather. And, I am going

to mail today to each Chief of Police of each incorporated city in our county a copy of this report for their examination and their action. And, of course, if they want to make it public, why, they can do so. Actually, it is just suggestions and I feel that they will follow them, but that is what the Court has done with all three of these reports that the past Grand Jury referred to us. Two are being referred to you now for further action and the last one is, as I stated, being given to the Chief of Police of the incorporated cities of the county. Now, Ladies and Gentlemen, you may begin your deliberations. The Bailiff will show you to your quarters. Please, both of you, let's

swear you in at this time. Mr. Friend, you are representing the District Attorney's Office?

Mr. Friend: Yes, sir.

The Court: This is Mr. Joe Friend, the Assistant District Attorney. Over here on my right is Mr. John Singleterry, one of the Bailiffs of this Court. And, Mr. John Brewster, the Bailiff of the Court. And, over here is Mrs. Lupita McMillon, a Deputy District Clerk. And on my left is our Court Reporter, Ray Eaves. Now, if the Bailiffs will step forward and take the oath. Please raise your right hands. "You solemnly swear that you will faithfully and impartially perform all duties as bailiff of the Grand Jury and keep secret the proceedings of the Grand Jury, so help you God"?

Mr. Singleterry: I do.

Mr. Brewster: I do.

The Court: Gentlemen, you may escort the Grand Jury to their quarters and I am sure that the District

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Attorney's office will be there promptly to assist you.

(Reporter's Note: Whereupon the Grand Jury left the Courtroom)

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CERTIFICATE

STATE OF TEXAS :

COUNTY OF HIDALGO :

I, Edward R. Eaves, Official Court Reporter of the 92nd Judicial District Court of Hidalgo County, Texas, at the time in question, do hereby certify that the foregoing pages number 1-12, inclusive, constitutes a true, full and correct transcript of my machine shorthand record made at the Impaneling of the Grand Jury on March 16th, 1972, before the Hon. J. R. Alamia, Judge of said Court.

In testimony whereof, I hereto set my Official Hand in Edinburg, Texas, this the 23rd day of July, A. D., 1974.

EDWARD R. EAVES
Edward R. Eaves, Official Court Reporter, Hidalgo County, Texas.

Three Hundred Form

THE STATE OF TEXAS

I, K. C. Boysen, Clerk of the District Court of Hidalgo County, Texas, on this 9th day of March 19 72, within thirty days of the day designated by the Honorable Judge of said Court on which the Grand Jury is to be impaneled, having opened the envelope delivered to me by the Honorable J. R. ALANIA District Judge of the 92nd Judicial District, embracing said County, containing the list of Grand Jurors selected by the Jury Commissioners of said County for the said term of Court, do, from said list, make the following copy of the names of persons so selected as Grand Jurors, to-wit:

1 R. R. CABAZA, JR., WESLACO	11 GRADY BENNETT, EDINBURG
2 ROBERT MANNING, EDINBURG	12 ALICIA GARZA, LA JOYA
3 DIEGO GARZA SULLIVAN CITY	13 ADOLPH WESTERMAN, MC ALLEN
4 ERNEST SERVIERE, MC ALLEN	14 RICHARD CORTEZ, WESLACO
5 JANICE R. HOLMAN, MC ALLEN	15 ALFREDO GARZA, EDINBURG
6 OSCAR TREVINO, EDINBURG	16 MRS. SCOTT TOOTHAKER, MC ALLEN
7 ADELA BAZAN, SULLIVAN CITY	17 RICHARD MARTINEZ, SR., MC ALLEN
8 RUPERT RICHARDS, MC ALLEN	18 HORACIO GARZA, SULLIVAN CITY LA JOYA
9 RICHARD J. GERES, MC ALLEN	19 D. A. FAULKNER, MC ALLEN
10 JOSE CALVILLO, JR., WESLACO	20 H. W. WALLACE, JR., WESLACO

THE STATE OF TEXAS,
County of HIDALGO } I, K. C. BOYSEN Clerk of the District Court of said County, do hereby certify that the above list is a correct copy of the list of names selected by the Jury Commissioners as Grand Jurors for the next term of the District Court to be begun and holden in and for the County of HIDALGO, State of Texas, on the 16th day of March 19 72

Witness my hand with the seal of said Court attached this the 9th day of March 19 72

K. C. BOYSEN

Clerk of the District Court of HIDALGO County, Texas.

By ____ Deputy.

To the Sheriff or Any Constable of HIDALGO *County, Texas:*

You are hereby commanded to summon each of the foregoing named twenty persons to be and appear before the District Court of HIDALGO County, at the Courthouse in EDINBURG, TEXAS, on the 16th day of March A. D. 19 72, at 9:30 o'clock A. M., then and there to serve as Grand Jurors for the MARCH Term, 19 72, of the District Court of HIDALGO County.

HEREIN FAIL NOT, And of this writ make due return as the law directs.

WITNESS K. C. BOYSEN Clerk of the District Court HIDALGO County.

Given under my hand and seal of said Court, at office in EDINBURG, TEXAS this 9th day of March A. D. 19 72.

K. C. BOYSEN, Clerk

District Court HIDALGO County, Texas.

By ____ Deputy.

THE STATE OF TEXAS,
County of Hidalgo } I, Claudio Castaneda Sheriff of Hidalgo County, Texas, do hereby certify that the within and foregoing list of Grand Jurors came to hand on the 10th day of March A. D. 1972 at 10:00 o'clock A. M., and was executed by me as follows, to-wit: By giving personal notice on the respective dates following each name, to each of the following named Jurors of the time and place when and where he was to attend as a Grand Juror, viz:

NAME	DATE OF SERVICE Year	Month	Day	Hour	NAME	DATE OF SERVICE Year	Month	Day	Hour
1 R. R. Cabaza Jr.	1972	3	11	1:00 PM	11 Grady Bennett	1972	3	10	4:15 PM
2 Robert Manning	1972	3	10	4:15 PM	12				
3					13				
4					14				
5					15				
6 Oscar Trevino	1972	3	11	12:00 PM	16 Mrs. Scott Toothaker	1972	3	10	3:30 PM
7					17				
8					18				
9 Richard J. Geres	1972	3	10	4:00 PM	19 D. A. Faulkner	1972	3	11	9:00 AM
10 Jose Calvillo Jr.	1972	3	11	1:00 PM	20 H. W. Wallace Jr.	1972	3	11	1:30 PM

By leaving at the respective places of residence, and with a member of his family over sixteen years old, on the date following each name, a written notice to the following named Jurors that each of them had been selected as a Grand Juror, and the time and place when and where he was to attend, to-wit:

NAME	DATE OF SERVICE Year	Month	Day	Hour	NAME	DATE OF SERVICE Year	Month	Day	Hour
1					11				
2					12				
3					13 Adolph Westerman	1972	3	10	4:00 PM
4 Ernest Serviere	1972	3	10	3:30 PM	14 Richard Cortez	1972	3	11	1:00 PM
5 Janice R. Holman	1972	3	10	3:30 PM	15				
6					16				
7	-		-		17 Richard Martinez Sr.	1972	3	10	9:45 PM
8 Rupert Richards	1972	3	11	2:00 PM	18 Horacio Garza	1972	3	11	5:00 PM
9					19				
10					20				

By mailing by registered mail, as directed by the Honorable Judge of said District Court, to the respective places of residence on the date following each name a written notice to the following named Jurors that each of them had been selected as a Grand Juror and the time and place when and where he was to attend, to-wit:

NAME	DATE OF SERVICE Year	Month	Day	Hour	NAME	DATE OF SERVICE Year	Month	Day	Hour
1					11				
2					12				
3					13				
4					14				
5					15				
6					16				
7					17				
8					18				
9					19				
10					20				

The following named Jurors were not summoned for the reasons stated below:
Diego Garza, Unable to Locate;; Adela Bazan Unable to Locate;;
Alicia Garza Unable to Locate;; Alfredo Garza, out of the State

All of which I certify to be correct.
Witness my hand this the 16 day of March A. D. 19 72

Claudio Castaneda Sheriff.
By S/C Compton Deputy. Hidalgo County, Texas.

BEST COPY AVAILABLE

[1]

REPORTER'S TRANSCRIPT OF PROCEEDINGS
OF JUNE 28, 1974

(Caption Omitted)

APPEARANCES

For the Petitioner: David G. Hall, Esq.
James S. Hale, Esq.

For the Respondent: Oscar B. McInnis, Esq.

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1:30 p.m.

The Court: All right, I will call this Civil Action 74-B-50, Rodrigo Partida Versus Claudio Castaneda, Sheriff of Hidalgo County, on writ of habeas corpus.

May I inquire how long you think this hearing will last?

Mr. Hall: Your Honor, I don't think it will take too long.

How many witnesses will you have?

Mr. McInnis: We have one witness that will probably take 15 minutes.

The Court: All right. I have been checking on this thing and I don't know if you all are familiar with the Davis case that was just passed by the Supreme Court.

Mr. Hall: Davis Versus United States.

The Court: And I was trying to—in fact that is what I have my law clerk doing now, getting me the Federal Rule to compare it with the Code of Criminal Procedure, 27 is it, 19, because that might end this case. If there is no question that this man filed his motion attacking the grand jury that indicted him some three or four months after he had been convicted, and if the Davis case controls, that might end this case.

Mr. Hall: Your Honor, to get in the law here immediately, initially, couple reasons why I don't feel like

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Davis does control.

First of all, Davis involves a guilty plea and this was a trial before a jury. And the Court in both Davis and its companion case, Tollett Versus Henderson, went at some pain to express its concern for the guilty plea as being a waiver of all kinds of constitutional rights, including that one of challenging the grand jury. And its does not really have any applicability and the high Court has not spoken to that question except through Faye Versus Noia which establishes a general collateral attack through or waiver standards in Federal Court. That one thing.

Secondly, Coleman Versus Alabama which is Supreme Court of about five or six years ago, lays down the rule that when the State's highest Appellate Court does not see fit to dismiss the defendant on waiver grounds and rules on the merits, then the Federal Courts themselves on collateral attack or on direct review are not going to

apply the doctrines of waiver. If the State doesn't feel like it is important enough to dismiss him on waivers then the Federal Courts wouldn't either.

And I will have the citation for the Clerk if you would like, but that case, I think, takes us out of the Court of Criminal Appeals.

I think under the doctrine of Coleman Versus Alabama, regardless of what the Federal standards may be,

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that we don't have problems of waiver.

The Court: All right, put on your first witness.

Mr. Hall: Your Honor, if it please the Court, before we start I would like to introduce a couple of law clerks that are helping me this summer, Merrily Moore and Roger Reed, and request permission of the Court to—they are the only ones that can find their ways through my files.

The Court: Sure.

Mr. Hall: Your Honor, I realize that the Court has set this as an evidentiary hearing, but at the outset I would like to raise a question concerning the availability of an additional evidentiary hearing at the request of the State. I would like to call the Court's attention to some authority in the Fifth Circuit, Brown Versus Tate, which is the only thing that I can find.

This is a fairly unique sort of a situation where it is not the petitioners that is requesting a re-litigation of

factual issues but it is the State of Texas. We had what I considered on behalf of my client to be a full and fair hearing before Judge Alamia on the motion for new trial, and then our petition for habeas corpus we plead in there that there is no longer a necessity for an additional hearing on this matter, evidentiary hearing. That is one thing.

The other day when we started, when we were getting ready for this thing, I talked to Mr. McInnis about whether

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there was any statutory authority for an evidentiary hearing on the request of the State, and we took a look at 5154(D) which sets out those presumptions or those circumstances that the Court is familiar with, I'm sure, those seven or eight circumstances under which a petitioner could have an evidentiary hearing. And there is really no provision in there for the State to have an evidentiary hearing at its request.

And thirdly—

The Court: That is under the State rule?

Mr. Hall: No, Your Honor. That is under the habeas corpus, 28 U.S. 5154(D), that subsection D which is—2154, subsection B.

The Court: Yes.

Mr. Hall: And finally, Your Honor—

The Court: 2254.

Mr. Hall: 2254, right. I stand corrected.

Finally, Your Honor, there is another—

The Court: Well, I don't care what the statute says. I run this Court and I am going to give them a hearing.

Mr. Hall: Very well.

The Court: So don't argue that point anymore. You think you have something on it, take me upstairs. I'm giving them all the hearing they need.

Mr. Hall: Very well, Your Honor.

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The Court: I first ruled that this man has no case but then he found that case by the Fifth Circuit, but I don't think that is good law either. So we are going to go forward.

Mr. Hall: Very well.

The Court: Yes.

Mr. Hall: So mark this as Petitioner's Exhibit 1.

(Petitioner's Exhibit Number 1 marked for identification.)

The Court: Were you able to get me anymore statistics on how many of the jury commissioners were, you know,

for five jury commissions, grand jury commissions, how many were from Mexican surname and how many were not? And of those that were selected, I think the jury commission selects what is it, 18?

Mr. Hall: Twenty.

Mr. McInnis: Twenty.

The Court: Twenty. All right, and then 12 serve?

Mr. Hall: That's correct.

The Court: And nobody asks to be excused, I guess the first 12 are the ones.

Mr. Hall: That is more by custom and practice than anything else.

The Court: All right. They start talking about

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I want to be excused, and Pancho Garcia says I don't speak English very well and I want to get out, so off he goes. All they need is 12. So the Judge doesn't fool around, and anybody wants to get excused they excuse them.

Isn't that what happens?

Mr. Hall: Well, the statute merely provides that 20 people be selected by the commissioners and then those people will report to the Judge and he examines their qualifications and chooses 12.

The Court: Does he choose 12? Does the statute say that?

Mr. Hall: Right. He chooses the 12, and I think what really happens—

The Court: Because under our rules here, see, I call, say, 35 names, I can only use 23, and if nobody asks for an excuse, I take the first 23, see. I don't choose. I go by the way they are drawn.

Mr. Hall: I think that is probably custom.

I recall a Supreme Court decision that talks about the Texas procedure and how it operates, but what I think it really amounts to they follow—

The Court: But does the statute?

Mr. Hall: I believe the statute just refers to the—

The Court: How do you all do it, Mr. McInnis? Do

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you know? Suppose a grand jury commission make a list of 20 names and they are in order, I guess.

Mr. McInnis: Right.

The Court: Suppose all 20 report?

Mr. McInnis: The Judge takes the first—

The Court: And nobody asks for an excuse, can the Judge excuse—pick and choose?

Mr. McInnis: He doesn't pick and choose. He takes the first 12.

The Court: He takes the first 12?

Mr. McInnis: We are going to put on a little testimony regarding this matter, if the Court please.

Mr. Hall: Your Honor, as I recall, that is a matter of practice or custom and not by statutory direction. But I think universally that is the process that is followed.

The Court: You told me that he chose, see. But to me that means picking the 20th name and 17th name and the ninth name, you know.

Mr. Hall: Right.

The Court: That is not the case?

Mr. Hall: There is a case, Your Honor, and I think it went before the Supreme Court and I can't recall the style of it now where that objection was raised, that they always putting the Black grand juror—they put one token Black on the jury—I think it was in Dallas—and

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he was always number 20 on the list, and so they would never get to number 20 because the practice was to always take the first 12 that were qualified.

But the Judge goes through and qualifies these people, and the custom is the first 12.

At this time, Your Honor, I would like to introduce—I have given a copy of this to Mr. McInnis, introduce—Petitioner's Exhibit Number 1 was an affidavit by the attorney who represented him at the trial of this cause, Mr. Joe Cardenas. This is supplemental in many respects to the affidavit that is attached to his motion for new trial. I added some additional language to it after talking to Mr. Cardenas yesterday to meet some questions raised in apparently recent Fifth Circuit decision.

The second thing I want to introduce, Your Honor, if that be necessary—

Mr. McInnis: Just a minute. Before you get—

The Court: All right.

Mr. McInnis: If the Court please, I have agreed and make no objection to the introduction of the affidavit. However, I did expect him to have the witness here and I intended to ask him some questions concerning his qualifications, and in view of the fact that he isn't here—

The Court: Is that Mr. Cardenas?

Mr. McInnis: Mr. Cardenas. We have agreed and

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stipulated, short stipulation, if the Court please, and with the Court's permission I would like to add it is agreed and stipulated between petitioner and respondent that Mr. Cardenas is a practicing attorney in the State of Texas, that he has been a practicing attorney for at least 10 years, that he is a graduate of a recognized law school, that he

worked in the District Attorney's Office of Hidalgo County for a period of two or three years shortly after being licensed to practice law, that he practices both criminal and civil law in Weslaco, Texas, and that he practices in both State and in this Honorable Court and has done so for several years.

Mr. Hall: Yes, so stipulate.

The Court: Yes. All right.

Mr. Hall: Second thing we are introducing, Your Honor, is the transcript of the proceedings in the State Court. This will be the entire trial transcript.

The Court: Now, I don't want to burden this record with anything that is not—you are not attacking anything in this case other than the composition of the grand jury?

Mr. Hall: That's correct, Your Honor.

The Court: All right. And does that contain the—I think I already have the portion where Judge Alamia had the hearing. That is already before me, isn't it?

Mr. Hall: This is the official record and trans-

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cript, Your Honor, of course.

The Court: But that is the whole case, wasn't it, that was appealed?

Mr. Hall: Right. This includes the Statement of Facts

and everything in the whole appeal, in the whole case. This is the record that went up before the Court of Criminal Appeals. The part that is relevant to this is the last part of it that concludes as motion for new trial, amended motion for new trial, and pleadings on that, together with all of the statistics in support of the complaint regarding grand jury composition, and that is all included in the transcript here.

The Court: That is actually the portion that you want to introduce?

Mr. Hall: That's correct, but since it is all bound together I don't know how to separate it and introduce these and that, so it is in two parts, including the appellate briefs.

The Court: I will admit it.

(Petitioner's Exhibit Number 2 marked and received in evidence.)

Mr. Hall: Now then, Your Honor, as I understand it I have a burden to show on behalf of Mr. Partida that the grand jury that indicted him was not properly representative of an identifiable, cognizable class, and I would like at

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this time to call the Court's attention to what is in this record before turning the field over to Mr. McInnis.

The Court: May I call your attention to a case that was cited by the Fifth Circuit just on April 12th? I don't

know whether you are familiar with it. It is Greich versus Wainwright.

Mr. Hall: Correct, Your Honor.

The Court: Those were cited on April 12th. And there the Court held, you know, that litigant is not entitled to a jury which mirrors composition, ethnic or religious group in the community wherein he resided but is merely entitled to a jury which is fairly selected.

Mr. Hall: That's correct.

The Court: In other words, I can have a Mexican tried here in my Court with a jury composed of nothing but gringos or a gringo tried with jury composed of nothing but Mexicans and they can't complain as long as the method of selecting the jury doesn't exclude either one from the jury.

Which is a fact here in this Court. Any panel that I have here always, I think, mirrors the percentage of the people in this area. I would imagine that at least 70 percent of my jurors are Mexican descent but a man might be tried with a jury of nothing but Anglos or nothing but Mexican-Americans. And if that's the case he can't complain.

Mr. Hall: That's correct.

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The Court: As long as the jury that those came from was fairly selected.

And that is what this case seems to make reference to.

Mr. Hall: That language in Greich comes from Swain Versus Alabama and it is directly cited language. The magic phrase, I suppose, that a jury, be it grand or trial —

The Court: For my purpose it is a fact that the Fifth Circuit chose again to use that language as late as April 12th of 1974.

Mr. Hall: That language has been repeatedly used since 1967 or whenever it was first — when Swain was decided.

Swain Versus Alabama, Your Honor, was a petit jury case that was challenging the practice of the District Attorney of using his peremptory challenges from a Black —couldn't have substantial Black population—to strike off all the Blacks on the jury panel so none ever got to sit on the jury. It was not the kind of situation that we have here where we are attacking the pool from which the jurors are selected. The Swain language that a jury, be it trial or a petit, does not have to reflect a mirror image of the community's population, means exactly that.

And I don't dissent from that. But what we have

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here is a funny kind of mirror. It is one of those mirrors that you find in the funny house that makes skinny people look fat and fat people look skinny. We have a situation in a County of 71.1 Mexican-Americans over a 10-year

period only 39 percent of jury panels have been comprised of Mexican-Americans.

The Court: Have you taken into consideration the thousands of resident aliens that live in that community, or wetbacks that are counted in the census that wouldn't be eligible to serve. The thousands that say they don't know how to read or write or speak English? You know that to exist.

Mr. Hall: Your Honor, what the problem is here is that the cases say -- we have to look at the population of the jurisdiction as a whole. We have to examine that population to see whether there is an identifiable class such as Blacks or Mexican-Americans. We have to determine whether or not that class is subject to discrimination which the statistics, bulk of the statistics before the Court and record now —

The Court: Well, isn't it a fact, too, that many of the grand jurors in Hidalgo County, say the last 10 years, many of those grand juries have had on many occasions more Mexican-Americans on the grand jury than Anglos?

Mr. Hall: Not many. A few have. There have been

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a few where it has been more or less balanced. That record is in there as an exhibit. But even so, even if it were 50 percent it would still be a 30 percent disparity, and the Fifth Circuit and the Supreme Court have said that when —

The Court: Just a minute. My law clerk here just called my attention to the fact that when you said, Mr. Hall, that the burden was on you, well, says you just show a discrepancy which I think you have shown.

Mr. Hall: Yes, Your Honor.

The Court: And then the burden shifts to the State.

Mr. Hall: That's correct.

The Court: And I shouldn't put the burden on you to show me about the aliens, resident aliens, illegal aliens, people that can't read or write English or speak English. And he is right on that, and that is what I held, that is why I reversed myself here, and I said that you had made the point and that then it became incumbent upon the State under this Muniz case out of El Paso for them to go forward. So that is the reason that I asked Mr. McInnis to go forward.

Mr. Hall: I just wanted to make sure that the Court was satisfied with the prima facie case.

The Court: I am satisfied that you have made a point.

Mr. Hall: Okay. I was going to try to shift that

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burden as soon as I could, but we did want to establish the point here today that we had proven this prima facie case.

The Court: I think I already held that in my granting you the re-hearing here.

Mr. Hall: Very well, Your Honor. Then at this time we will rest on the proof that exists in the record.

The Court: Yes.

Mr. McInnis: May it please the Court, for the purposes of the record we would like to introduce as the State's first exhibit the answer which we filed, and it had attached to it, I think, the authority by which we are holding the defendant. And with the Court's permission I will get it out a little later and let the Clerk mark it, if I may.

The Court: All right. You are going to make it available to them, or they already have it?

Mr. McInnis: Yes sir, they have — you have a copy of that?

The Court: Do you have a copy?

Mr. Hall: Yes, I have a copy.

The Court: Yes. All right.

Mr. McInnis: And I would like to call Judge Alamia.

The Court: All right, Judge.

You want to waive the oath on the Judge?

Mr. Hall: I believe the Judge will tell the truth.

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J O S E A L A M I A, called as a witness by the State, the oath having been waived, testified as follows:

DIRECT EXAMINATION

BY MR. McINNIS:

Q. State your name, please, sir.

A. Jose Alamia.

Q. And you are also known as J. R. Alamia, are you not?

A. That's right.

Q. And you are Judge of the 92nd District Court of Hidalgo County, Texas?

A. That's correct.

Q. Judge, how long have you been a Judge of that Court?

A. Since November 12th, 1969.

Q. And I believe until recently the 92nd District Court was the only Court that impaneled grand juries in Hidalgo County, was it not?

A. That's correct.

Q. Do you know about when it was that the other Courts commenced inmpaneling grand juries in our County?

A. Sometime, oh, prior to September '72. It is conceivable that it could have been as early as the early part of '73.

Q. All right, sir. But in March 1972, that term of

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Court at which this particular defendant was indicted,

I believe your Court was the only Court that impaneled grand juries, was it not?

A. That is true.

Q. And had been thus for several years?

A. Yes sir. As far back as I can remember.

Q. Yes sir. Now, of course we use the grand jury commissioner system of selecting grand juries in Texas, is that correct, sir?

A. That is right.

Q. And I believe that the law provides that the presiding Judge shall select not less than three nor more than five grand jury commissioners to select a grand jury, is that correct, sir?

A. That's correct.

Q. And you as Judge of the 92nd District Court have and do appoint the grand jury commissioners who select the grand jurors for your Court, do you not, sir?

A. Yes.

Q. How are the grand jury commissioners selected?

A. Well, the practice that I use I try to think of names of people that I know in the County, and I select one man from each commissioner's precinct, and then the fifth one usually comes from the more populated area such as McAllen and Edinburg.

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Q. All right, sir. And you ordinarily then select five commissioners, the maximum which the law permits?

A. Yes. I started out with three because ordinarily that was — well, that is what I understood to be the practice, but then I went from three to four and then to five.

Q. And do you have any practice at this time and have you had any practice in the past as to the number of people that you put on your grand jury commission with Mexican-American backgrounds or ethnic origins?

A. Yes.

Q. And what practice do you use? Out of these five how many do you ordinarily appoint who have a background of Mexican-American?

A. I try to appoint the greater percentage of Mexican-Americans. Since I have been appointing five I usually appoint three Mexican-Americans and the other two either might be Anglo with Anglo names or on occasions I have selected the fifth one as a colored man.

Q. All right, sir. And are there any particular instructions that you give the grand jury commissioners with reference to their selecting the grand jurors who are to actually serve?

A. Generally the instructions that I give them I put them under oath and then I qualify them and I give them lists of those people which are made available by the Clerk by the

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way, those people that have served in the past year. Usually we hand them the whole big bound volume of names that have served on grand juries for years back.

The Court: What is the purpose of that, Judge? To keep them off of another grand jury or to tell them those that are already qualified and have experience, or what?

A. The purpose of that is that the law requires that you select grand jurors who have not served the past year.

The Court: The past year or years?

A. The past year for one year back before.

The Court: But you give them a list of names of not only the past one year but four or five years back?

A. Yes. We give them that because it is bound, the list is bound. But they don't need but one year's list of names.

The Court: All right.

A. And then after I do that I tell them that they have been selected geographically. I instruct them as to what the qualifications of a grand juror are, and the disqualifications.

The Court: Judge, do you all make a record, is it transcribed, what you tell the grand jury commissioners?

A. No sir.

The Court: You don't have a Reporter there, do you?

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A. No, I do not.

The Court: What you actually told the grand jury that indicted this boy is not available to us?

A. No sir.

I then tell them about the exemptions that the law provides for. I also advise them that exemptions, the fact that people are exempt, do not mean that they are dis-

qualified from serving on the jury. I just merely pointed it out to them so that in the event that they want to consider that, why, they can do so.

I forgot to tell you that in composing the grand jury commission I usually appoint a woman also on that grand jury commission, be she a Mexican-American or Anglo. I usually have at least one woman. Lately I have also tried to appoint people between the ages of 18 and 25. Someone to represent the younger group.

The Court: Better not say you are going to limit it to one woman because you are going to have the gals on your neck.

The Witness: I realize that.

The Court: Next time I have a woman defendant here they will say —

The Witness: I realize that, Judge, but my experience has been that that woman gets her way and we end up with four or five female grand jurors. How I don't know.

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But that has been our experience. And then I will tell them to go ahead and make their selections of 20 people.

Q. All right. And they do select 20 people, do they not?

A. Yes sir.

Q. Those are sealed and filed with the District Clerk until such time as you order that they be opened and notified to appear?

A. And the District Clerks, including all of them, including the deputies, take an oath to that effect.

The Court: That the names are not to be divulged until —

A. Until the Court orders the grand jury to appear.

Q. Now, using this system, did you select the grand jury commissioners for the March 1972 term which I think the record reflects is the term of grand jury that indicted this defendant?

A. Yes sir, I did.

Q. And I don't know whether I have asked you to check or not or whether you have that available with you, but do you know from the record, or if you have it available, give it to us for the record, how many people, persons with Mexican-American names, were selected to serve on the grand jury commission that selected the grand jury that indicted the defendant?

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A. Yes sir.

Q. And how many were there?

A. There were three.

The Court: Do I have that record before me?

Mr. Hall: Which one is that?

The Court: Who were the people that you selected as commissioners?

A. All right, for the March term, Carlos Guerra of Weslaco. He is an insurance man. Clarence Davis of McAllen. He is a CPA. Oscar Garza of Edinburg. He is

a rancher. Hermanlinda Benavides, wife of a businessman in McAllen. And Marion Carlson of Edinburg.

They composed the five people that were appointed on this grand jury commission for the March term 1972.

The Court: And that one you had three of them?

A. Three out of five, that's correct.

Q. And do you have the list with you of the March 1972 grand jury that actually served which was selected by this —

The Court: If he has can you give us the 20 names that were selected by this jury commission?

A. I did not bring that with me, Judge. I have the list of the 12 that served.

The Court: Do you know if the list from which they were selected is available?

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A. It is available.

Mr. Hall: Your Honor, I should have a copy of it.

Mr. McInnis: May be in the record. It shows 10 Anglo names, 10 Mexican-American names on the 20.

The Court: Do you agree with that, Mr. Hall?

Mr. Hall: Yes sir, Your Honor. That is in the record. But we don't have the actual names. But the table indicates that there are 10 Anglo names.

The Court: Ten and 10.

Mr. McInnis: Ten and 10 were selected on the panel.

Mr. Hall: And it also indicates, Your Honor, that the grand jury that actually indicted was, I believe, five Mexican-Americans and seven Anglos.

Mr. McInnis: That's correct.

The Court: Five Mexican-Americans and seven —

Mr. McInnis: Seven Anglo names, Your Honor.

The Court: All right.

Q. Judge Alamia, there was some little discussion few minutes ago about the manner in which you select the grand jurors once you have the list, so very briefly I would like for you to tell the Court how you go about selecting them, once the 20 people are in there. I don't mean give him all instructions that you give them, but after those that

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have been excused that want off, how do you select the 12 that serve?

A. The first 12 people that qualify, and I have the Clerk read off the names, and they serve. This has been my practice all the time.

The Court: You don't choose and pick? If you like number 20 because he is your compadre, you don't put him up above the 12?

A. No sir.

Q. Judge, do you have with you — and I don't know whether you have this or not — it appears in the record some place — but the number of grand jury commissioners in the year 1972 who actually served in your Court? How many were appointed that year.

A. During 1972?

Q. If you please, if you have that information; if you don't —

A. Well, I have the January term. That was five people, three of Mexican-American names, Samuel Sanchez, Ida Martinez and Joe S. Martinez.

And the March term I have already stated.

The May term, five people. Victorianno Garcia, Lalo Cavazos, and Juanito Arredondo. Three out of five were Mexican-Americans.

And then we skipped the July term and go into

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September. We never call a grand jury during summer months.

In September I have five people. Leo James Leo, Jose Noe Gonzalez and Rodolfo Garza. Three out of five.

And then November—

The Court: Now this Leo James Leo is a Mexican.

A. Yes, sir.

The Court: He just has a gringo name.

A. That's correct.

The Court: Yes.

A. I would say English name.

The Court: Well, Anglo name, all right.

A. Yes. All right.

The Court: But Leo James Leo is as Mexican as you and I.

A. Yes.

The Court: Yes.

A. And in November—I don't think that the September term, the grand jury selected for the September term, actually served. For some reason or another we did not have need for a grand jury, and therefore for the November term—

The Court: Blackout on crime in Hidalgo County?

A. I imagine that was the reason. The District Attorney didn't indicate that he needed a grand jury and he just didn't impanel one.

The Court: All right.

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A. We went into the November term, and the grand jury commission for the November term again contains

the name of Leo J. Leo and Armando Guerra. In that case there were only four people, and I do not recall why there were only four but I believe that the fifth one was not able to serve, and for that reason his name does not appear.

But there were two out of four in that case.

And that completes the year '72.

The Court: Do you have a recorded or transcribed by a Reporter the actual impaneling of a grand jury?

A. Yes sir.

The Court: So that is available to us, isn't it?

A. Yes sir.

The Court: Do you know if it can be made available to this Court, just exactly what you told the 20 people that were summoned to serve for the March term?

A. Yes sir.

The Court: And if people asked you for excuse, who the ones asking you for excuses were?

A. Yes sir.

The Court: Do you think that can be made available to us?

A. Yes sir, now with one—

The Court: You know 10 and 19, they tell me, well, it is only five and seven. Well, I want to know why these

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people were—five of the 10 Mexican names were excused, did they ask for an excuse, did they give you this business about I don't speak English or what.

The Witness: Since I have been Judge of the 92nd District Court, Judge, there has only been one occasion when a grand juror excused himself that I can remember.

The Court: Because of lack of English?

A. Yes sir. And he wasn't a Mexican-American. He was of Polish descent.

The Court: The thing is this: I want to know, you know, the proceeding of the impaneling of the grand jury that indicted this man; if it could be made available to us we could sure see what happened. Why were there only five out of 10. I want to see that if it is available.

Mr. Hall: Your Honor, the thrust of our argument, if I might clarify this a little bit, is no allegations of discrimination against Judge Alamia. What the problem that we see is in the jury pools, those lists of 20 people selected by the commissioners, our complaint is that those five people go into a room and we have no idea what goes on in there, it is secret, they come up with 965 jurors over a period of 10 years, only something less than 40 percent of which are of Mexican-Americans in the County that has an 80 percent Mexican population. And the

cases, of course, hold that wherever in the history of the selection process discrimination

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like that, apparent discrimination like that occurs, then it poisons the entire system.

The Court: Don't you think it is just as bad for Judge Alamia to testify that here is a Mexican that you must select 17 or whatever the percentage is, Mexican-Americans? Don't you think that is just as bad?

Mr. Hall: I certainly would not advocate that kind of instruction. No, I would not advocate that kind of instruction.

But would you say like in Brooks V. Beto you would have to have—one of the obligations of a commissioner is that you produce us a group of panel of grand jurors that is representative of all groups in the community, the women, as Judge Alamia indicated, Blacks, the Mexican-Americans, everybody, and that somewhere, unless there is a statistical anomaly somewhere, or discrimination, then the panels that are resulting from those kind of instructions should reflect more or less what the community demography is. And that is all we are asking. I think that kind of instruction could be given.

But what we are focusing on, Your Honor, are those panels—

The Court: Are you telling me that there has never, in Hidalgo County, never in Hidalgo County in the 20

people selected by the grand jury commission, selected more than one-

[30]

half the available grand jurors?

For instance, this case it was 10 and 10. Are you trying to tell me that there never has been a case when it was 15 and five?

Mr. Hall: The greatest number was in November of 1968—that is not right—

The Court: You have that list in there?

Mr. Hall: Right. Fifteen and five was the highest number there ever was, and that occurred once.

The Court: That I have in there?

Mr. Hall: But over the years there has never been one, a single jury, jury panel, that approached the population norm of 80 percent. Virtually all of them with very few exceptions were less than 50 percent Mexican-American composition, and that is not sufficient to get us up—

The Court: I think that, if the majority of the people, you know, like 15 and five, that might only happen once or twice or three times, but the fact that it happened shows that the system is not wrong, see, because it would never have happened if the system was otherwise, you know. Discrimination against, it would never happen, you know. And the fact that it has happened shows that the system is all right.

Mr. Hall: Your Honor, we are not in this case challenging the system. We are challenging the results of

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the system in this particular man's case, and he was indicted by a grand jury that was drawn from a pool that is 30 percent under representative of his ethnic group, and that is what we are complaining about.

The Court: That is what you are complaining about. Yes. All right.

Q. Judge Alamia, have you looked at the—of course I know he isn't complaining about this but I would like for the record to show—have you checked the jury lists or the petit jury that actually tried this defendant there in your Court? He was tried in your Court, was he not?

A. That's correct.

Q. And have you checked that jury list?

A. No, I haven't.

Q. All right.

A. I recall—well, my memory serves me correctly, I think there were seven.

Q. Seven Latin names?

A. Yes, on the jury. But I am not sure of that.

Q. I believe that is correct. Six Latin names and one lady had a Latin first name, Anglo last name?

A. That's correct.

Q. All right. And the penalty, actually the penalty in this case, was set by you, was it not, after a pre-sentence investigation?

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A. That's right.

Q. The jury did not set the sentence?

A. No sir.

Q. The penalty?

A. I set it.

Q. And petit jurors in our County, of course, are selected from the jury wheel indiscriminately, are they not?

A. That's correct.

Q. And it is now filled by the poll tax—not poll tax but registered voters?

The Court: It sure would be good if Texas goes to the Federal system, get your grand jurors and petit jurors out of the same pool. That would save a lot of problems.

Mr. McInnis: That it would.

The Court: Because I end up here with juries that might be out of balance, you know, but the way people are selected, you know, sometimes they might be out balanced one way; other times they would be out balanced the other way. But that is just a question of average. But the average would always be about the same, you know. So the system that Texas uses has been upheld for selecting grand juries. No question about that.

All right, go ahead with your interrogation.

Mr. McInnis: If the Court please, I believe that

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is about all I have.

The Court: Do you have any questions of Judge Alamia, Mr. Hall?

Mr. Hall: Just a second.

The Court: If the actual impaneling of the jury that indicted this man was of record, the transcript of that, could you make it available to the Court? I sure would appreciate it.

Mr. McInnis: If the Court please, we request that we be permitted to make a search for it, and if it is available that we have it transcribed and have it filed with the Clerk as an exhibit.

The Court: You don't have any objections to that?

Mr. Hall: Excuse me, Your Honor. I was talking to my co-counsel.

The Court: I asked him if it was at all possible to get me the transcript of the actual proceeding of the impaneling of this grand jury.

Mr. Hall: No objections.

The Court: Mr. McInnis said he is going to look for it. If it is available he is going to file it with the Clerk.

Mr. Hall: I would like the opportunity of reviewing it first.

The Court: Yes.

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Mr. Hall: We have no objection.

CROSS EXAMINATION

By Mr. Hall:

Q. Judge Alamia, you have told us what kind of instructions you give your jury commissioners, and it is true that you do attempt in your own selection of commissioners to balance the ticket, if you will, is that correct? Did I understand your testimony?

A. That's correct.

Q. You normally try to get at least three Mexican-Americans and you try to geographically balance it, is that correct?

A. That's correct.

Q. And frequently try to have a woman, occasionally a Black person to your commission, and recently 18 to 25-year olds?

Now, what is the purpose of doing that, Judge Alamia?

A. Well, I think it is more representative of the people that we deal with in Court.

Q. Okay. Now, do you give any instructions whatsoever to your commissioners, once they are selected, to have them balance the tickets the same way?

A. No sir.

[35]

Q. Now, why do you not do that?

A. I never have felt that that was necessary in Hidalgo County, Mr. Hall.

Q. Now, Judge, you are familiar with all these statistics that have been introduced in the Court this afternoon, is that correct?

A. Yes.

Q. We had a hearing in your Court—

A. I am familiar with them but I do not recall just what the statistics show.

Q. Well, do you recall what is labelled as Exhibit "A" in the transcript—

Mr. Hall: Your Honor, this is a copy of the transcript; it is not exactly the same as the one before the Court, not numbered the same, but it is in that.

The Court: All right. Do you recall that?

A. I recall having seen it but I do not recall it as such.

The Court: Exact figures. All right.

A. I remember that he introduced it.

Q. All right. You do recall that this was a certified copy of records from the District Clerk's Office, that one of the Assistant Deputies, one of the Deputy Clerks, reviewed and reviewed all your lists of grand juries drawn not only from the time that you have been appointing grand

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juries but as far back as 1962?

A. Mr. Hall, I do not recall how it was introduced or who testified to it, to tell you the truth. I remember that you presented it, but I don't know how, where it came from.

Q. Okay. It has been some time?

A. Yes sir.

Q. You do not quarrel with the accuracy of these figures, however?

A. I have no way of quarreling with them.

Q. All right. Does it surprise you at all to learn that only 39 percent of the grand jurors, members of the venire panel, are members of Mexican-American descent?

The Court: Of those that actually served or were called?

Mr. Hall: Members of the panel, chosen.

The Court: Called and served?

Mr. Hall: Not the ones that served; the ones called.

The Witness: Does it surprise me?

Q. Does that surprise you?

A. What period of time do they cover?

Q. We are talking from January of 1962, January term 1962, until March of 1972, which was the grand jury that indicted Partida.

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A. Well, I guess it would surprise me except that I have been surprised at other times. For instance, there is

one time that I thought we ought to have members of the news media on the grand jury, and I think I appointed two members of the news media on the grand jury commission, but I ended up with no members of the news media on the grand jury.

The Court: Surprised you?

Q. Maybe it was professional jealousy.
A. I really don't know.

Mr. Hall: Well, the question I have, of course, Your Honor, is that over an extended period of time, talking about 900 and—excuse me—870 people that have been chosen—

The Court: But that was since 1962.

Mr. Hall: That's right.

The Court: Lots of changes happened since 1962. The whole complex of this area has changed in the last 12 years. I think a more fair comparison would be one from, say, five years back.

Mr. Hall: Very well.

The Court: Been a lot of changes in the last five or six years.

Mr. Hall: I haven't calculated—

The Court: Judge Alamia wasn't selecting the grand

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jury commission then.

Mr. Hall: I calculated that, Your Honor, from the time —Judge Alamia, you went on the Bench in January of 1970?

A. November of '69.
Q. November '69. Okay. So the first jury that served that was called in your Court would have been one for—

The Court: January of '70?

A. That's correct.

Mr. Hall: January '70. I calculated those figures, Your Honor, and the Court could do so also because they are all in the record.

The Court: You calculated them? Give them to me.

Mr. Hall: It is 45 and something percent of the panel.

The Court: Getting better.

Mr. Hall: It has gotten 60 percent better.

The Court: Yes.

Mr. Hall: And it has closed the gap by that.

The Court: And after this suit by you might even get better.

Mr. Hall: It might, Your Honor. We hope so.

Q. But, Judge Alamia, you will recognize that the

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results of this selection process that has been going on in Hidalgo County for these number of years, wherever you want to cut it, has not resulted in grand jury panels that are representative of the ethnic balance in the community?

A. You mean population wise?

Q. That's correct.

A. No, I believe that's correct.

Mr. Hall: I have no further questions, Your Honor.

The Court: You know when we reviewed this thing back here we made some calculations ourselves, you know, and one of the things that worried me at the time was the fact that when this jury selection process takes place in Hidalgo County things get worse. Start out with, say, 60 percent of the jury commission being Mexican-Americans, but then when you go to selecting a jury panel that the jury is selected from, it dropped down to a 55 deal. And then from those that actually serve, you know, it goes down to about 43 percent.

For instance, out of 12, five out of 12, something like that. And it would be very interesting for some student that is working on his Master's, you know, or doctorate to find out why the progressively getting worse.

I think you are going to find out that it is because of people themselves, Mexican-American descent, wanting to exclude themselves from the process, you know. Some

of them the women, you know, Mexican-American women, usually don't

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want to have anything to do with Court. They get scared, want to get out with any excuse that they can use; having children and all that. They want to get out of any business like this. They don't like it.

I know from personal experience. If my mother had ever been called—it's a good thing they didn't have women on juries then—if my mother had ever been called to a jury she would have died.

It would be interesting to know, you know, why, why. Is it because of econo[illegible] background of some of our people that might be selected? They are so needed at the jobs they are afraid to lose their job if they stay away and serve on a grand jury or jury. It would be very interesting to find out why, why this happened, you know.

I don't believe that it is because of any determined discrimination on the part of anyone. I think it has other social and economic reasons for it. I don't think that it is a determined thing.

It does look funny to me, you know, that at sometime or another some grand jury in Hidalgo County should have 12 Mexican-Americans. You know law of averages would dictate that, see. Never has happened. I don't think you ever had one with nine, 10, see.

Looks very funny to me that those things don't happen once in a while, you know. Ought to. By God, the law

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of average dictates it.

So maybe these people have something in their complaint here. I don't know what the answer is.

But the law is evolving gradually in this area, and I think that Davis decision might have something to do with this case, and I will have to look into it. I haven't had a chance to read this. I just glanced through it, this last supplemental brief that Mr. McInnis filed.

Mr. Hall: Correct. I just got a copy of it.

The Court: It goes into this question of this waiver.

Mr. McInnis: We didn't mention Davis although we found it in the Criminal Law Reporter, and the reason we didn't, we thought the facts were different; he pled guilty.

The Court: I don't think the Supreme Court makes that distinction.

Mr. McInnis: Maybe they didn't, but I thought they made some distinction.

The Court: I don't think they made that distinction.

There has to be finality. That is one of the greatest problems we are having in the law today. Nothing is ever final. Something ought to be final. A case ought to end somewhere sometime, see, this continuous process, you know, I think it was Judge Campbell, a retired senior Judge from

[42]

the Northern District of Illinois, wrote an article, you know, how a defendant now gets about eight or nine bites at the apple, you know. A never-ending proposition.

Mr. McInnis: If the Court please, I have no more questions as to Judge Alamia.

The Court: I don't think you have either.

Mr. Hall: No.

The Witness: Judge, I may want to say something in connection with what you stated, and I do want to correct my testimony in one respect.

The Court: All right.

The Witness: I selected the grand jury commission that served for the November term in '69. I stated that I started in January, but actually I selected the grand jury commission that served in November. And they selected the grand jury for November term. And there were nine Mexican-Americans on that grand jury.

The Court: On that grand jury?

A. Yes sir. And I haven't checked the others to see what percentage, but on that one there were.

The Court: And your first grand jury that you selected, had anything to do with selecting the grand jury commissioners, and out of the grand jury that actually served there were nine?

A. Yes sir. And there were only two — well, there

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were three Mexican-Americans — well, there were four commissioners, and out of those four three were Mexican-Americans.

The Court: And you ended up with a grand jury of nine and three?

A. Of nine, yes sir.

The Court: That was quite a departure from the past, I'll bet you.

A. Yes sir.

The Court: Yes.

Mr. McInnis: That is all I have to offer the Court.

Mr. Hall: That is all I have.

The Court: Step down.

(Witness excused)

—o—

The Court: I would love to have the transcript of what happened.

Mr. McInnis: Yes.

The Court: I want to see just what happens when a State District Judge go to impanel a grand jury. Might

be that will give us some indication of what excuses people use. And if that can be made available to me I sure would appreciate it.

Mr. McInnis: We will certainly get it for the

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Court if it is available.

The Court: All right.

And have you all filed all the briefs that you care to file?

Mr. McInnis: Yes sir.

Mr. Hall: Your Honor, I would like to have leave to file another brief, and it won't take me but about two days.

The Court: Will you address yourself to this Davis case?

Mr. Hall: At length. Sure will

Mr. McInnis: What is the citation?

The Court: I am going to be leaving on vacation on the 5th of July. I finally was able to get me a Judge out of Miami to come down here and try some cases for me. So I am going to be able to take off for a few days. So I don't intend to work on this thing until after I come back.

Mr. Hall: When will you be back, Your Honor?

The Court: I should be back some time around the 10th of August.

Mr. Hall: I will file a brief by then.

The Court: All right.

Why don't we set the filing of anymore things that you all want to by the 12th of August.

Is that all right with you, Mr. McInnis?

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Mr. McInnis: That is all right. I don't know that I will file anything else. I might if he comes up with anything. I think I know about the Davis case.

The Court: If you file yours, say, by the 5th of August, if he wants to file anything he will file it by the 12th.

Mr. Hall: Sure.

The Court: And if you can find this other transcript, I sure would love to have it.

Mr. Hall: This is one other item, Your Honor. If the Court will recall on that second order there was a recommendation that the releasement of Partida on bond while this thing was pending. Judge Mallet and I got into some legal theory by the thing and came to the conclusion it was impossible until we got Mr. Partida here physically present and in custody of the Court so this Court could release him. He was a State prisoner up until this time, and we felt like now that there was an authority for this Court to release him on bond as the Court had recommended.

The Court: Was this man out on bond during his trial?

Mr. Hall: Yes, Your Honor, he was out on bond through the appeal and everything else until the mandate came down. We got him locked up so we could file our petition for habeas corpus, and he has been locked up since then.

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The Court: I don't remember anything about this man. Does he have a previous record?

Mr. Hall: Yes, Your Honor. He has a previous record but he was out on a $5,000 bond. I found him to be extremely reliable, Your Honor. He reported to me —

The Court: What kind of bond was he out under? Personal surety?

Mr. Hall: Personal surety bond.

The Court: Do you object to this man —

Mr. McInnis: We haven't objected to him making a $5,000 bond during the pendency of this proceeding. We have no objection. He doesn't have any bond right now, and if the Court order said either release him on his present bond or let him make a new bond one, but I feel that is —

The Court: Is his bond still in effect?

Mr. McInnis: I don't think so. I feel that they are released whenever the mandate of the Court of Criminal

Appeals is returned and he is taken into custody and he has no bond.

Mr. Hall: We talked to Judge Alamia, I think, and Judge Alamia felt like he didn't have jurisdiction anymore since it was a matter from the Court of Criminal Appeals. But now this Court does have jurisdiction.

The Court: All right. Where does he make his bond? With my Magistrate?

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Mr. Hall: Right.

The Court: I guess so.

Mr. Hall: We turned in the bond.

The Court: Sheriff Castaneda says, well, I don't have any — all right, I am going to order that this man, pending the outcome of this case and any appeal therefrom, be released on a $5,000 cash or surety bond, to be accepted by the United States Magistrate for the Brownsville Division of this Court, and upon the making of that bond that the U. S. Magistrate advise Sheriff Castaneda that this man has made such bond and he shall be released.

But don't you release him until my U. S. Magistrate, Judge Mallet, tells you that he has made a bond.

All right. We will do that.

Mr. Hall: Thank you, Your Honor.

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In The United States District Court §
For The Southern District Of Texas §

I, Lloyd E. Horn, Official Court Reporter, United States District Court, Southern District of Texas, do hereby certify that I reported the proceedings had in the above styled and numbered cause, on the 28th day of June, A.D. 1974; that said proceedings were later reduced to typewriting under my personal supervision, and the above and foregoing 47 pages of typewriting constitute a true and correct transcript thereof.

Given under my official hand, this the 22nd day of November, A.D. 1974.

LLOYD E. HORN
Lloyd E. Horn
Official Court Reporter

[49]

CERTIFICATE OF SERVICE

I, THOMAS PARKER BEERY, a member of the Bar of the Supreme Court of the United States, do hereby certify that three (3) copies of the foregoing have been served on Respondent by depositing same with the United States Postal Service, Certified Mail, postage prepaid, addressed as follows: David G. Hall, Law Offices of Texas Rural Legal Aid, Inc., 103 E. Third, Weslaco, Texas 78596, on this the ____ day of July, 1976.

THOMAS PARKER BEERY
Assistant Criminal District Attorney
Hidalgo County, Texas

Supreme Court, U. S.
FILED
MAY 19 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1552

CLAUDIO CASTANEDA, Sheriff,

Petitioner,

—v.—

RODRIGO PARTIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1552

CLAUDIO CASTANEDA, Sheriff,

Petitioner

V.

RODRIGO PARTIDA,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

This brief is submitted in opposition to a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit seeking review of a judgment of that Court which reversed a judgment of the United States District Court for the Southern District of Texas denying post-conviction habeas corpus relief for Respondent, a state prisoner.

QUESTION PRESENTED

In holding that the State failed to produce sufficient evidence to rebut Respondent's prima facie case of grand jury discrimination, did the Court of Appeals decide a question of federal law in a way in conflict with applicable decisions of this Court?

STATEMENT OF THE CASE

Respondent Rodrigo Partida was indicted by the March Term, 1972 grand jury for the 92nd Judicial District Court of Hidalgo County, Texas. Respondent complained that the grand jury that returned the indictment had a characteristic in common with all Hidalgo County grand juries over at least the previous ten years--that Mexican-Americans were systematically excluded or underrepresented on the grand jury panels.

In a direct appeal from the conviction on such indictment, the Texas Court of Criminal Appeals rejected Respondent's claims of jury discrimination on the merits, and Respondent was taken into the custody of the County Sheriff, Petitioner herein. On April 5, 1974, Respondent initiated the present action by filing his Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas. That Court set the case for an evidentiary hearing, and in so doing, notified the Sheriff that it would be his burden to produce evidence explaining or justifying the "systematic underrepresentation of Mexican-Americans

in the Grand Juries of Hidalgo County...." (Record, Instrument No. 6: Memorandum and Order, p. 1)

The evidence upon which both the District Court and the Court of Appeals found to their satisfaction a prima facie case was a gross statistical disparity between the numbers of Mexican-Americans in the county population and those actually being chosen for grand jury service. According to the 1970 Census, 79.2% of the Hidalgo County population is composed of persons of Spanish language or Spanish surname. On the other hand, of those chosen for grand jury service by the jury commissioners over the ten-year period prior to Respondent's indictment, only 39.0% have been persons of Mexican descent or national origin. In other words, the disparity between the population norm and the jury norm has been 40.2%. (Record, Petitioner's Exhibit No. 2: Tr. 228, 266, and 268).

At the hearing before the District Court the only evidence offered by the Petitioner to explain the huge disparity in the percentages was the testimony of the state judge who presided over the selection of the grand jury. The state judge testified regarding his efforts to obtain balanced jury commissions, but stated that he did not instruct the commissioners on their duties under the Constitution to select juries that are representative of a cross-section of the community. (Record, Instrument No. 30: Transcript, pp. 19-21, 34). In addition, the judge admitted that the selection process had not resulted in

panels that were representative of the ethnic balance in the county. (Record, Instrument No. 30: Transcript, pp. 38-39). The State made no effort to introduce evidence that would explain or justify the statistical disparity proven by Respondent.

Nevertheless, the District Court held that the State had met its burden of rebuttal. The factors apparently relied upon by the District Court were (1) that the Respondent's statistics were based upon total population rather than adult population, (2) that the ten-year period taken for comparison was too extensive in a "rapidly changing area," (3) that a "larger ineligible migrant and illegal alien population" existed in the county, and (4) that Mexican-Americans constitute a "governing majority" in the county.

The Court of Appeals, in its opinion and judgment of December 11, 1975, agreed with the District Court that Respondent had proven a prima facie case, but disagreed that the evidence offered by the Sheriff was sufficient to explain the existing disparities. Irregardless of any presumed "governing majority" status by the class of discriminatees, the Court of Appeals held that "the unexplained disparities here are simply too great and too long existent for the county system to escape unrectified." Partida v. Castaneda, 524 F.2d 481, 485, n. 9 (5th Cir. 1975). Accordingly, the judgment of the District Court was reversed and remanded. After two stays requested by Petitioner had expired, the Court of Appeals issued its mandate on April 19, 1976.

REASONS FOR DENYING THE WRIT

1. The sole ground for review urged by Petitioner is a contention that the Court of Appeals decided a question of federal law in a manner inconsistent with previous decisions of this Court. Yet Petitioner fails to indicate a single federal question decided by the Court of Appeals that conflicts with a decision of this Court. The reason for that failure is readily apparent: the lower court ruled on a matter of evidence, not law.

The principle error suggested by the Petitioner does not involve a novel question of federal law, but rather a question of evidence. There is no real dispute among the parties regarding issues of law, for the principles governing challenges to jury composition have been carefully refined by this Court in almost 100 years of decisions: Strauder v. West Virginia, 100 U.S. 303 (1880) to Taylor v. Louisiana, 419 U.S. 522 (1975). The principles are well settled; it is their application to present facts that provoke controversy.

The question resolved by the Court of Appeals was whether the Petitioner had sustained his burden of rebuttal. In determining that he had not, the appellate court embarked on no new judicial ventures. The Court of Appeals merely measured the failure of the Petitioner's offer of proof. In the face of statistics documenting a gross exclusion of Mexican-Americans from the grand juries of the county, the Petitioner offered no statistical evidence of his own that would even partially explain

the disparate treatment of the ethnic groups in the jury pools. Rather than facts, the Petitioner offered his own interpretations of Respondent's data and the assurances of the state judge who initiated the selection process that he had not intentionally discriminated against any identifiable class.

The Court of Appeals found that offer of evidence wanting when measured against established legal standards. A comparison of the 40.2% disparity proven by Respondent with that deemed sufficient to prove a prima facie case in recent decisions of this Court demonstrates that the disproportion is not only substantial, it is enormous. Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) (prima facie case: 65% total black population, but only 32% black representation on jury panels); Turner v. Fouche, 396 U.S. 346 (1970) (prima facie case: 60% total black population, but only 37% black representation on grand jury list); Whitus v. Georgia, 385 U.S. 545 (1967) (prima facie case: 42.6% adult black population and 27.1% black taxpayers, but only 9.1% blacks on grand jury venire and 7.8% on petit jury venire); Jones v. Georgia, 389 U.S. 24 (1967) (prima facie case: 30.7% adult black population and 19.7% black taxpayers, but only 5% on jury lists); Sims v. Georgia, 389 U.S. 404 (1967) (prima facie case: 24.4% black taxpayers, but only 4.7% blacks on grand jury lists and 9.8% in jury pool); Swain v. Alabama, 380 U.S. 202 (1965) (no prima facie case: 26% adult black population, 10% to 15% black representation on grand and petit jury panels); Alexander v. Louisiana, 405 U.S.

625 (1972) (prima facie case: 21.06% adult black population in the parish, but only 6.75% black representation on grand jury venire); Taylor v. Louisiana, 419 U.S. 522 (1975) (53% adult female population, but only 10% on jury venires). The statistical case offered by Respondent clearly fell within the parameters of previous case law. The Petitioner's rebuttal evidence, in the words of the Circuit Court, was simply "too paltry."

2. The only novel legal issue to arise in the course of this litigation was the District Court's treatment of the perceived status of Mexican-Americans as a "governing majority." Hampered by the deficiencies in the record caused by the failure of the Petitioner's proof, the trial court sought to distinguish all precedent decisions on the basis that the discriminatees in those cases were either a minority or a "non-governing majority," citing Black v. Curb, 464 F.2d 165 (5th Cir. 1972); Turner v. Fouche, 396 U.S. 346 (1970); Pullum v. Greene, 396 F.2d 251 (5th Cir. 1968); and Salary v. Wilson, 415 F.2d 467 (5th Cir. 1969). Not only do none of the cited opinions articulate the "non-governing majority" distinction, none of them, with the possible exception of Turner, even discuss the level of political participation by the class subjected to discrimination. The Turner opinion mentions political participation only tangentially and in connection with the unusual role played by the grand jury in the selection of the board of education; there is absolutely no suggestion that blacks in Georgia would not be heard to complain

of discrimination if they were a "governing majority."

The proposed "governing majority" doctrine is not only completely without precedent, it would also be cumbersome and difficult in its application. Even experts in the field of political science would find it difficult to determine the level or degree of participation by any identifiable class or group in the processes of the body politic. In addition to quantitative data, such as the numbers and characteristics of registered voters and office-holders, evaluation of qualitative factors would be required as well, such as the amount of power and influence wielded by any given office-holder and a determination of whether the official is representing the interests of the class of discriminatees or instead is a figurehead for another group or class. Rather than grapple with such difficult factual issues, the temptation becomes great for the trial court to resolve the matter by judicial notice, as was apparently the case here. The District Court's determination that Mexican-Americans are a "governing majority" in Hidalgo County has virtually no support in the record. For example, there are no statistics showing the number of registered Mexican-American voters as compared to Anglo voters, nor the number of Mexican-American office-holders and the types of offices held. Yet without empirical evidence or expert opinion, the lower court concluded that Mexican-Americans were a "governing majority."

In addition to being cumbersome and difficult in its application, the suggested

rule would be pernicious as well. If the "governing majority" distinction were applied as it was by the District Court, a class of discriminatees, once having achieved "governing majority" status, could no longer complain of a conviction obtained at the hands of a jury from which members of the class had been systematically excluded. Such a rule mocks the Fourteenth Amendment's promise of a trial before an impartial jury of one's peers. Cf. Taylor v. Louisiana, 419 U.S. 522 (1975).

3. Finally, Petitioner would have this Court believe that the Circuit Court's decision was the death knell for the jury commissioner system in Texas. Unfortunately, such is not the case. Although the Texas system has passed constitutional muster in this Court on several occasions, Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); and Hernandez v. Texas, 347 U.S. 475 (1954), its application in individual cases has frequently been found wanting. And although Respondent would applaud its burial, it remains a system capable of producing fair results when administered by those who understand and adhere to "...what duty requires." Cassell v. Texas, supra, at 293 (Frankfurter, J., concurring.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1552

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v.

RODRIGO PARTIDA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion delivered by the Fifth Circuit Court of Appeals, is reported at 524 F.2d 481 (1975).

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on December 11, 1975, and the Petition for Certiorari was filed in this Court on April 26, 1976. Certiorari was granted on June 14,

1976. The jurisdiction of the Supreme Court is invoked pursuant to 18 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

I. Whether or not the Petitioner rebutted the Respondent's prima facie case of discrimination in grand jury selection.

II. Whether or not the decision of the United States Court of Appeals for the Fifth Circuit is in conflict with several Supreme Court decisions.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment Fourteen, Sec. 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Texas Code of Criminal Procedure, Annotated, Article 19.01 (Amended):

> "The district judge, at or during any term of court, shall appoint not less than three, nor more than five persons to perform the duties of jury commissioners, and shall cause the sheriff to notify them of their appointment, and when and where they are to appear. The district judge shall, in the order appointing such commissioners, designate whether such commissioners shall serve during the term at which selected or for the next succeeding term. Such commissioners shall receive as compensation for each day or part thereof they may serve the sum of Ten

> Dollars, and they shall possess the following qualifications:
>
> 1. Be intelligent citizens of the county and able to read and write the English language;
>
> 2. Be qualified jurors in the county;
>
> 3. Have no suit in said court which requires intervention of a jury;
>
> 4. Be residents of different portions of the county; and
>
> 5. The same person shall not act as jury commissioner more than once in the same year."

Texas C.C.P., Annotated, Article 19.03:

> "When the appointees appear before the judge, he shall administer to them the following oath: 'You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged'."

Texas C.C.P. Annotated, Article 19.06, (Amended):

> "The jury commissioners shall select not less than 15 nor more than 20 persons from the citizens of different portions of the county to be summoned as grand jurors for the next term of court, or the term of court for which said commissioners were selected to serve, as directed in the order of the court selecting the commissioners."

Texas C.C.P., Annotated, Article 19.08, (Amended):

"No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the state, and of the county in which he is to serve, and be qualified under the Constitution and laws to vote in said county, provided that his failure to pay a poll tax or register to vote shall not be held to disqualify him in this instance:

2. He must be of sound mind and good moral character.

3. He must be able to read and write;

4. He must not have been convicted of any felony;

5. He must not be under indictment or other legal accusation for theft or of any felony."

Texas C.C.P., Annotated, Article 19.21:

"When as many as twelve persons summoned to serve as grand jurors are in attendance upon the Court, it shall proceed to test their qualifications as such."

Texas C.C.P., Annotated, Article 19.22:

"Each person who is presented to serve as a grand juror shall, before being impaneled, be interrogated on oath by the court or under his direction, touching his qualifications."

Texas C.C.P., Annotated, Article 19.23 (Amended):

"In trying the qualifications of any person to serve as a grand juror, he shall be asked:

1. Are you a citizen of this state and county, and qualified to vote in this county, under the Constitution and laws of this state?

2. Are you able to read and write?

3. Have you ever been convicted of a felony?

4. Are you under indictment or other legal accusation for theft or for any felony?"

Texas C.C.P., Annotated, Article 19.26:

"When twelve qualified jurors are found to be present, the court shall proceed to impanel them as a grand jury, unless a challenge is made, which may be to the array or to any particular person presented to serve as a grand juror."

STATEMENT OF THE CASE

The Respondent was indicted on March 17, 1972, for the offense of burglary of a private residence at night with intent to rape, contained in the first count of the indictment, and burglary, in the second count of the indictment. Thereafter, on December 19, 1972, the Respondent was found guilty by a jury of burglary of a private residence at night with intent to commit rape, after pleading not guilty.

A pre-sentence investigation was ordered, and on February 16, 1973, the Court sentenced Respondent to serve eight (8) years in the Texas Department of Corrections. From such action, the Respondent appealed. The conviction was affirmed by the Court of Criminal Appeals on March 6, 1974, in *Partida v. The State,* 506 S.W.2d 209. Thereafter, the Respondent filed an application for a Writ of Habeas Corpus in the United States District Court for the Southern District of Texas, claiming discrimination in

the selection of the grand jury which indicted him. A hearing was held on his application. Judge Alamia of the 92nd District Court, the Court which impanelled the grand jury which indicted the Respondent, testified at the hearing concerning the manner of selecting grand jury commissioners and grand jury impanelling. At the request of the Court, the State filed a transcript of the proceedings wherein the grand jury which indicted the Respondent was selected and impanelled. Attached to the transcript of that proceeding was a list of the grand jurors originally selected by the grand jury commissioners which ultimately indicted the Respondent. This list indicates that 50 percent of the names appearing thereon were Spanish. The record indicates that 3 of the 5 jury commissioners, 5 of the grand jurors who returned the indictment, 7 of the petit jurors, the judge presiding at the trial, and the Sheriff who served notice on the grand jurors to appear had Spanish surnames.

On October 26, 1974, the United States District Court denied the application for a Writ of Habeas Corpus and held:

(1) That the Respondent had not waived his right to object by failing to object at an earlier time; and

(2) That the Respondent had established a *bare prima facie* case by proving a long continued disproportion in the composition of the grand juries in Hidalgo County, but the Court held that it has been rebutted.

Thereafter, the Respondent appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals, in its opinion, found that Respondent's prima facie case of discrimination in grand jury selection was not rebutted and ordered the case reversed and remanded.

SUMMARY OF ARGUMENT

I. Petitioner did effectively rebut Respondent's prima facie case of discrimination in grand jury selection.

The Respondent employed the "rule of exclusion" to establish his prima facie case of grand jury discrimination. He produced evidence that the total population of Hidalgo County, Texas, in the year 1970 was 181,535 persons. Of that number, some 143,611, or approximately 79.2%, were persons of Spanish language or Spanish surname. Evidence was then introduced to show the composition of the grand jury "lists" (the 15-20 persons selected by the grand jury commissioners from whom a grand jury panel of 12 is selected) over a ten year period of time, showing a statistical disparity of some 40.02%. The Petitioner countered with sworn testimony of District Judge J. R. Alamia, a Mexican-American, who selected the grand jury commissioners who selected the grand jury that indicted the Respondent. He testified that he had selected three out of five Mexican-Americans as grand jury commissioners. These five commissioners then selected twenty persons for the grand jury "list". Of this number, 50% were Mexican-American. The sheriff who summoned them was Mexican-American. Judge Alamia denied that any sort of discrimination against Mexican-Americans had entered into his selection of the grand jury commissioners. Mexican-Americans constitute a "governing majority" in Hidalgo County. The Texas system of selection of grand jurors allows the subjective element to enter into its jury selection process. Therefore, "if people in charge can choose whom they want, it is unlikely they will discriminate against themselves. A broader range of variation should be tolerated here, because the Texas selection

system allows the governing majority to favor their group when selecting grand jurors". See *Partida v. Castaneda,* 384 F.Supp. 79.

II. In the instant case the Fifth Circuit has applied the equal protection clause of the federal constitution in a way not entirely consistent with several relevant Supreme Court decisions.

In the Court of Appeals' opinion, it is stated that "Judge Alamia offered no explanation for the disparity. Indeed, he testified that he sought a balance of grand jury commissioners according to ethnic origin, race, sex and age, *yet he did not instruct the commissioners to do the same.*" (Emphasis added.) It is the Petitioner's position that such instructions from Judge Alamia would be a violation of the principle that "jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race". *Cassels v. Texas,* 339 U.S. 282. The Supreme Court has recently held in the case of *Taylor v. Louisiana* that "Our holding does not auger or authorize the fashioning of detailed jury selection codes by federal courts. The fair cross-section principle must have *much* leeway in application . . . Carter v. Jury Commission and other cases recognized broad discretion in the States in this respect. We do not depart from the principles enunciated in Carter." (See *Taylor v. Louisiana,* 95 S.Ct. 692.) The instant case is similar to that of *Swain v. Alabama,* 380 U.S. 202, where the Court held that "Here the commissioners denied that racial consideration entered into their selection of either their contacts in the community or the names of prospective jurors . . . Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully

represented. But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think that the burden of proof was carried by petitioner in this case." If the Court of Appeals is to require that Texas District Court Judges are to instruct grand jury commissioners to seek out racial and sexual quotas in filling the grand jury list, then it would be meaningless to retain such a system. In effect, the Court of Appeals' decision, by implication, has spelled the doom for the statutory scheme for selection of grand jurors as enacted by the elected representatives of the people of the State of Texas.

Purposeful inclusion of members of a race, sex, class, or ethnic group in a grand jury panel or list is just as constitutionally impermissible as purposeful exclusion of such persons.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, THOMAS PARKER BEERY, a member of the Bar of the Supreme Court of the United States, do hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been served on Respondent by depositing same with the United States Postal Service, Certified Mail, postage prepaid, addressed as follows: David G. Hall, Law Offices of Texas Rural Legal Aid, Inc., 103 E. Third, Weslaco, Texas 78596, on this the _____ day of July, 1976.

THOMAS PARKER BEERY
Assistant Criminal District Attorney
Hidalgo County, Texas

Supreme Court, U. S.
FILED
AUG 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1552

CLAUDIO CASTANEDA, Sheriff,

Petitioner,

—v.—

RODRIGO PARTIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1522

CLAUDIO CASTANEDA, Sheriff,

Petitioner,

v.

RODRIGO PARTIDA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF FOR THE RESPONDENT

STATEMENT OF THE FACTS

Respondent RODRIGO PARTIDA was indicted by the March Term, 1972 grand jury for the 92nd District Court of Hidalgo County, Texas. Partida complained that the grand jury that returned the indictment had a characteristic in common with all Hidalgo County grand juries over at least the previous ten years--that Mexican-Americans were systematically excluded or underrepresented on the grand jury panels. In a jurisdiction where Mexican-Americans comprised approximately 79.2% of the population, only 39% of the jury pool chosen by the various commissioners were of Mexican descent. The Respondent prisoner has urged that the gross underrepresentation of his ethnic group--the product of an abuse-prone selection system--raised a strong inference of discrimination that his prosecutors were required to rebut, a rebuttal which has never been forthcoming.

Texas uses the commissioner system for selection of grand juries. Briefly stated, the district judge selects three to five commissioners prior to the beginning of each term of court. Art. 19.01, Texas Code of Criminal Procedure. The commissioners then select from fifteen to twenty persons as potential grand jurors, persons who meet the statutory qualifications. Art. 19.08. After the fifteen to twenty persons so chosen are "tested," Art. 19.21, and are "interrogated," Arts. 19.22 and 19.23, the district judge then empanels twelve of the qualified jurors as a grand jury. Art. 19.26. During the period of which complaint is made, 1962-

1972, the Hidalgo County grand jury commissions met either five or six times each year and generally chose either sixteen or twenty persons as potential grand jurors. Defendant's Exhibit No. 1, App. 17.[1]

At the evidentiary hearings conducted by both the state and federal district courts, Partida sought to show that Mexican-Americans are an identifiable ethnic group within the jurisdiction in question and one that has been subject to discrimination. Respondent relied heavily upon data from the 1970 Census of Population conducted by the United States Census Bureau, Department of Commerce. The data submitted was both for the state as a whole and for Hidalgo County, in particular, which is included in its entirety in the Bureau's McAllen-Pharr-Edinburg Standard Metropolitan Statistical Area. Defendant's Exhibits Nos. 2 through 5, App. 19-21, are tables showing the condition of Mexican-Americans in the social and economic community for the State of Texas as a

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[1]References, unless otherwise noted, are to the record on appeal in the state courts, which is entitled "Transcript of Proceedings Had and Statement of Facts." That entire record was admitted into evidence by the U.S. District Court as "Petitioner's Exhibit No. 2" (Record, Instrument No. 30: Reporter's Transcript of Proceedings, p. 11). The most important exhibits from the state court transcript have been printed in the Single Appendix, and page references will be made to that document whenever possible.

whole. For example, Defendant's Exhibit No. 2, entitled "Median Texas Family Income, By Race," shows that for the state as a whole median income level for Spanish-language or Spanish-surnamed families is only about two-thirds as high as that for "White" persons, as that term is defined by the Census Bureau. Since the category "White" also includes persons of Spanish surname or language, which subgroup tends to depress the income level of the comprehensive group, it can be safely assumed that the income gap between Anglos[2] and Mexican-Americans would be even more pronounced. Other exhibits show that Mexican-Americans throughout the state are less likely to hold the preferred jobs with higher pay and status, Defendant's Exhibit No. 5, App. 21, that they are much more likely to suffer incomes below the poverty level, Defendant's Exhibit No. 4, App. 20, and that they have not been afforded the same educational privileges as Anglos, Defendant's Exhibit No. 3, App. 19.

Although the state-wide statistics demonstrate a significantly inferior social and economic position for Mexican-Americans, the differences between Anglos and Mexican-Americans become extreme when attention is focused upon Hidalgo County alone. Defendant's Exhibit No. 6, App. 22, shows that 52.8% of the county's Mexican-American population have family in-

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[2]The term "Anglo" refers to persons who are "White" but who do not bear Spanish surnames or speak Spanish as a primary language.

comes below the poverty level, whereas the corresponding proportion of Anglo families living in poverty is only 13.7%. In addition to exhibits showing similar disparities in education and types of jobs held, Defendant's Exhibit Nos. 7 and 8, App. 23-24, there are figures for the county that graphically demonstrate the comparative living conditions of Mexican-Americans and Anglos. Defendant's Exhibit No. 9, App. 25, shows that when Mexican-Americans in Hidalgo County own their own homes, 49% of those homes have a value of less than $5,000. On the other hand, only 10% of the Anglo families live in dwellings of such nominal value. Of those who rent their housing, fully 70% of the Mexican-Americans pay rent of less than $50.00 per month, as compared to only 21% of the Anglos who find it necessary to live in homes that command such minimal rentals. At the higher end of the rental schedule the disparity between persons with Spanish surnames and those without is equally as great.

The tables and supporting documents comprising Defendant's Exhibits Nos. 2 through 10 demonstrated in graphic detail the vastly inferior social and economic position held by the Mexican-American majority in Hidalgo County during the period under examination. That evidence documents an all-too-obvious fact--that Mexican-Americans in Texas and in Hidalgo County have traditionally been and continue to be the objects of discriminatory treatment.

In his effort to show the disparity between the composition of the population

of Hidalgo County and the composition of the grand jury panels of which complaint is made, Partida introduced Defendant's Exhibit No. 11 (Record, Petitioner's Exhibit No. 2: Transcript 266) and Defendant's Exhibit No. 12 (Record, Petitioner's Exhibit No. 2: Transcript 268). Defendant's Exhibit No. 11, which is an excerpt from the 1970 Census Reports, demonstrates that the total population of Hidalgo County in 1970 was 181,535 persons, while Exhibit No. 12 shows that of such total population, 143,611 were persons of Spanish language or surname, being approximately 79.2% of the total population. Defendant's Exhibit No. 11 further shows that the persons of foreign stock in Hidalgo County total 80,420, and that 75,032, or 93.5%, of such persons declare Mexico to be their country of origin. For the purposes of the 1970 Census, the category "Foreign Stock" includes the foreign-born population and the native population of foreign or mixed parentage. Thus, almost 95% of all first and second generation Americans in Hidalgo County were persons of Mexican descent in 1970.

As the final evidentiary element in the development of his prima facie case of jury discrimination, Respondent introduced Defendant's Exhibit No. 1, App. 17-18 (Record, Petitioner's Exhibit No. 2: Transcript 228), entitled "Hidalgo County Grand Jury Panels, 1962-1972." Taken from the records of the Hidalgo County District Clerk, Defendant's Exhibit No. 1 presents a summary of the composition of the grand jury panels over a ten-year period on the basis of the Spanish surname or non-Spanish surname of the prospective

jurors. The list includes all those jury panels chosen by the various grand jury commissions through and including the March Term, 1972 jury which returned the indictment in this case. Of the 870 persons chosen as potential jurors, only 339, or 39.0%, were persons of Spanish surname. During the period while the incumbent state district judge was selecting the jury commissioners (Record, Petitioner's Exhibit No. 2: Transcript 228), 11 grand juries were selected, the panels for which were composed of 220 persons, 100 of whom were of Spanish surname--approximately 45.5% of the panels.

No effort was made by the State of Texas at the hearing before the state district court to explain or justify that gross 40.2% disparity between the ethnic composition of the Hidalgo County population and the composition of the grand jury panels over a period of ten years. The United States District Court decided to offer the Petitioner another opportunity to explain or justify the apparently discriminatory selection results. The federal trial court had originally dismissed Partida's habeas application without a hearing (Record, Inst. No. 3: Order of Dismissal), but subsequently reinstated the cause on its docket after being presented with argument and authorities from Respondent on his first Application For Certificate Of Probable Cause (Record, Inst. No. 4). In its first Memorandum And Order, App. 12-13, the District Court advised the sheriff that Partida had presented sufficient evidence of jury discrimination to shift the burden of proof to the state, and the court set a hearing for the purpose

of receiving such evidence, if any existed.

Given a second chance to offer evidence to explain the unequal results of the grand jury selection system, the Petitioner offered only the testimony of the state judge who initiated the selection process. The judge, who himself is of Mexican ancestry, App. 71, testified that he usually appointed a jury commission comprised of three Mexican-Americans and two Anglos, App. 64, and that he also tried to appoint a woman and a young person. App. 66. The judge further testified that he explained to the commissioners the statutory qualifications for grand jury service, but that he did not instruct them on their duties under the Constitution to select jurors who are representative of a cross-section of the community. App. 79. Finally, the state judge testified that the selection process, regardless of the period of time being considered, had not resulted in grand jury panels that were representative of the ethnic balance in Hidalgo County. App. 84.

Although the burden had been squarely placed upon the State by the District Court, there was no evidence forthcoming that would tend to explain the 40.2% disparity in the population figures. Noteworthy by its absence was any statistical evidence that would show that Mexican-Americans in disproportionate numbers do not meet the statutory qualifications of citizenship, language ability, being of sound mind and good moral character, or being convicted felons and persons under indictment. For example, there is no suggestion in the record that language dis-

qualified any Mexican-American; to the contrary, the state judge testified that the only person in his experience who asked to be excused for language reasons was an Anglo who was of Polish descent. App. 73. Indeed, the State did not even offer any protestations of good faith from the jury commissioners who were responsible for selecting such disproportionately small numbers of Mexican-Americans.

SUMMARY OF THE ARGUMENT

Rodrigo Partida was indicted for and convicted of the offense of burglary by an Hidalgo County, Texas grand jury. He complains that the jury that returned the indictment had a characteristic in common with all grand juries in the county over at least the previous ten years--that Mexican-Americans were systematically excluded or underrepresented on the grand jury venires. It is the settled law of the land that an indictment is void if it has been returned by a grand jury from which an identifiable class or group has been systematically excluded or underrepresented.

The standards used to test grand juries and petit juries are essentially the same, and the norm to be achieved is a jury that is representative of a fair cross-section of the community. The jury, be it grand or petit, is to be composed of "the peers or equals of the person whose

rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." Strauder v. West Virginia, 100 U.S. 303, 308 (1880). Although the jury pools or the source from which jurors are drawn must strive for the representative norm, a criminal defendant cannot complain if his particular jury does not reflect a mirror image of the community's demography, for exact proportional representation is not required.

This Court has provided an analytical tool for the evaluation of jury discrimination claims. Under the "rule of exclusion," as announced in Norris v. Alabama, 294 U.S. 587 (1935), the party claiming jury discrimination bears the burden of proving a prima facie case. The usual method of proof is to demonstrate a substantial disparity between the percentage of the class or group in the jurisdiction as a whole and of the class on the jury list or other source from which the actual jurors are selected. Once such a disparity is shown, particularly where the selection system lends itself to discrimination, then the burden shifts to the state to offer evidence that would explain or justify the apparently discriminatory results on some basis that is constitutionally legitimate. Where the selection system relies upon the subjective, unfettered discretion of jury commissioners, or "key men," the

state's rebuttal evidence is subjected to "close scrutiny."

Although apparently blacks are not required to make such a showing, other groups claiming exclusion from the juries must prove that they are an identifiable class in the jurisdiction in question and that they are subject to discriminatory treatment. Mexican-Americans in the Southwest are such an identifiable class. Hernandez v. Texas, 347 U.S. 475 (1954). Through the use of census statistics Respondent showed to the apparent satisfaction of all concerned that Mexican-Americans in Hidalgo County and the State of Texas comprised just such an identifiable class in the community, one that has long been victimized by discriminatory practices. Specifically, statistics on income and poverty status, occupations, education and housing clearly demonstrated the inferior social and economic position held by those of Mexican descent in the county. Indeed, that contention has never been contested by Respondent and has been assumed by the lower courts.

Respondent commenced the proof of his prima facie case by showing that the Hidalgo County population in 1970 was 181,535 persons, 143,611 of whom (79.2%) were persons of Mexican descent. Partida's prima facie case of purposeful jury discrimination was based upon (1) the underrepresentation of his ethnic group by 29.2% on the list

of grand jurors drawn by the commission, (2) the underrepresentation of Mexican-Americans by 37.5% on the actual grand jury that returned the indictment against him, (3) the systematic, long-standing underrepresentation of Mexican-Americans by 40.2% on the grand jury venires over a ten-year period, or by 33.7% during the period while the incumbent state judge was selecting the commissioners, (4) the use by the State of Texas of a system of selection that relies upon the unfettered subjective discretion of "key men" as the source for potential jurors, (5) the easy identification of Mexican-Americans through their Spanish surnames by those who would discriminate, and (6) the failure of the state trial judge to instruct his commissioners not to discriminate on the basis of national origin.

The State failed to offer an adequate explanation in rebuttal of Respondent's prima facie case, even though the District Court had forewarned Petitioner that such an explanation was required. The only witness called by the State was the judge who selected the commissioners. That judge testified that he attempted, albeit unsuccessfully, to obtain a jury commission representative of the community on the basis of national origin, race, sex, and age. However, he further testified that he did not instruct the jury commissioners to achieve the same balance in selecting the grand jury venire. The

State offered no statistical evidence that would disqualify disproportionately large numbers of Mexican-Americans on the basis of alienage, language, character, or felony convictions.

The District Court's efforts to distinguish all precedent decisions on the basis of a perceived "governing majority" status of Mexican-Americans in the community, finds little, if any, support in the record or in the decisions of this Court. Ratification of the District Court's rule would effectively repeal the Fourteenth Amendment's promise of representative juries in the trial of criminal causes in South Texas. Such rule is based upon a presumption, never proven, that Mexican-American Commissioners cannot make conscious or subconscious selection decisions that deny full participation in the jury system to members of their own ethnic group. In the face of such overwhelming evidence of discrimination, the State's rebuttal must rest on a more solid foundation. For, as the Court of Appeals noted, "the disparities are too great and the proof offered too paltry." 524 F.2d 481, 485.

ARGUMENT

The Long-Standing, Systematic Exclusion or Underrepresentation of Mexican-Americans From the Grand Juries of Hidalgo County, Texas, Including the Grand Jury Which Indicted the Respondent, Denied Him Equal Protection and Due Process of Law.

For almost one hundred years it has been the settled law of the land that a criminal conviction cannot be sustained if it was obtained from juries, either grand or petit, from which an identifiable class has been systematically excluded. Strauder v. West Virginia, 100 U.S. 303 (1880); Neal v. Delaware, 103 U.S. 370 (1881). The right to be indicted and tried by fair and impartial juries is one of the cornerstones of our system of criminal jurisprudence.

> These principles compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well. Peters v. Kiff, 407 U.S. 493, 502-503 (1972).

Emphasizing that the subject at hand --the grand jury--is a vital link in the criminal justice system and not "... a mere constitutional frill or furbelow," Muniz v. Beto, 434 F.2d 697, 698 (5th Cir. 1970), the Chief Justice recently described this august institution's role in the following language:

> The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand

> jury continues to function as a barrier to reckless or unfounded charges. "Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice." Costello v. United States, 350 US 359, 362, 100 L. Ed. 397, 76 S Ct 406 (1956). Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance. United States v. Mandujano, ___U.S.___, 48 L.Ed.2d 212, 219 (1976) (emphasis added).

As suggested by the Chief Justice, the standard to be achieved is a jury that is representative of a cross-section of the community, for "[i]t is a part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." Smith v. Texas, 311 U.S. 128, 130 (1940). Although it is not necessary that any one particular jury or jury list be proportionately representative of all identifiable classes in the community, Akins v. Texas, 325 U.S. 398, 403 (1945), "[t]he aim and purpose of the law is to obtain juries which truly represent a cross-section of the community...." Billingsley v. Clayton, 359 F.2d 13, 18 (5th

Cir. en banc, 1966). See also, Fay v. New York, 332 U.S. 261 (1947); Glasser v. United States, 315 U.S. 60 (1942); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Ballard v. United States, 329 U.S. 187 (1946); Carter v. Jury Commissioners of Greene County, 396 U.S. 320 (1970); and Peters v. Kiff, supra. On even another occasion within the last year, the fair cross-section standard was reiterated:

> Both in the course of exercising its supervisory powers over trials in federal courts and in the Constitutional context, the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a cross-section of the community. Taylor v. Louisiana, 419 U.S.522, (1975).

The principle case cited by the Court in support of the fair cross-section requirement was Smith v. Texas, supra, in which the constitutionality of the composition of a grand jury was being considered. Thus, the applicability of such a standard to the jury that indicted Partida is readily apparent.

The standard to be achieved is a representative cross-section of the community; consistent failure over an extended period of time to achieve that standard is strong, objective evidence of purposeful discrimination by the selection system's administrators. Should the administrators fail to produce a suitable explanation for the

disparate results, the conviction obtained at the hands of the unrepresentative jury is void. Norris v. Alabama, 294 U.S. 587 (1935). These constitutional principles are well established and seldom disputed. Instead, issue is generally joined on questions of proof. The present case is no exception.

A. Mexican-Americans Are An Identifiable Class Subject To Discrimination.

The accused citizen complaining of jury discrimination bears the initial burden of showing that an identifiable, cognizable class or group exists within the community encompassed by the court's jurisdiction, a class or group that is subject to discrimination. Hernandez v. Texas, 347 U.S. 475 (1954); United States v. De Alba-Conrado, 481 F.2d 1266 (5th Cir. 1973). Hernandez settled the question that Mexican-Americans may be an identifiable ethnic group subject to discriminatory treatment, particularly in the Southwest, and that the Fourteenth Amendment is equally as applicable to discrimination based upon national origin as it is to discrimination based upon race.

Respondent supplied ample proof that his ethnic group is an identifiable class subject to discrimination in Hidalgo County. As background, he called the attention of the state courts and the federal trial court to a recent opinion in a school

desegregation suit entered by the same district court. Cisneros v. Corpus Christi Independent School District, 324 F.Supp. 599 (S.D. Tex. 1970), aff'd, 467 F.2d 142 (5th Cir. 1970). That court, having found that Mexican-Americans do not participate proportionately with their number in the different occupational levels, or income levels, or residential distribution within the community, stated as follows:

> [I]t is clear to the Court that these people for whom we have used the word Mexican-Americans to describe their class, group, or segment of our population, are an identifiable ethnic minority in the United States, and especially so in the Southwest, in Texas, and in Corpus Christi. This is not surprising; we can notice and identify their physical characteristics, their language, their predominant religion, their distinct culture, and, of course, their Spanish surnames. And if there were any doubt in this Court's mind, this Court could take notice, which it does, of the Congressional enactments, governmental studies and commissions on this problem. 324 F.Supp. 599, 607-608.

In a footnote to the quoted language the court indicated that it took judicial notice of, inter alia, Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000c, et seq.; a report of the United States Commission on Civil Rights, entitled

"Ethnic Isolation of Mexican-Americans in Public Schools of the Southwest;" regulations of the United States Department of Health, Education and Welfare implementing Title VI of the Civil Rights Act of 1964, and the Congressional creation of the Committee on Opportunity for Spanish-Speaking People. The cited reports, statutes and regulations were looked to by the court as evidence that Mexican-Americans comprise a segment of our society that has long been subject to discriminatory practices so pervasive as to require governmental intervention to attempt to reduce their impact on that class of our citizenry.

But rather than relying solely on governmental reports and statutory enactments as his proof that Mexican-Americans are subject to discriminatory treatment in Hidalgo County, Respondent submitted an abundance of data from the 1970 Census that conclusively shows that Mexican-Americans, both in the State of Texas and in Hidalgo County, are disproportionately treated to a lower economic status, inferior education, and inferior housing, vis-a-vis their Anglo brothers. For example, Defendant's Exhibit 6, App. 20, which was admitted in support of his Amended Motion For New Trial in the state trial court (Record, Petitioner's Exhibit No. 2: Transcript 29), indicates that well over half of the Mexican-American population of the county falls into the poverty category, while only 13.7% of the Anglo population had incomes below the poverty level. Furthermore, the statistics offered on occupational categories and housing

quality lead one unswervingly to the conclusion that the 20% Anglo minority overwhelmingly dominates the economic and social life of the community. Although the signs saying "No Mexicans Served" have come down, Hernandez v. Texas, supra, at 479, it cannot be denied in the face of such statistics that Mexican-Americans are still the victims of discrimination. Indeed, in his briefs and arguments in this Court and the lower courts, Petitioner has not really disputed the obvious fact that persons of Mexican ancestry in South Texas constitute an identifiable class subject to discrimination.

B. Respondent Proved A Prima Facie Case Of Jury Discrimination.

After proving to the satisfaction of the courts below that Mexican-Americans were a cognizable group subject to discrimination, it next became incumbent upon Respondent to prove that Mexican-Americans were in fact the victims of discrimination in the application of the jury selection laws in Hidalgo County. In doing so, Partida relied upon the "rule of exclusion" announced by this Court in Norris v. Alabama, 294 U.S. 587 (1935).

Norris provided the judiciary an analytical tool for the evaluation of jury discrimination claims. Proof of claims in the earlier cases, e.g. Strauder v. West Virginia, 100 U.S. 303 (1880) and Neal v. Delaware, 103 U.S. 370 (1881), was not required, since the exclusion of blacks

was then mandated by statute. In Norris, the Court was confronted with a statutory scheme that made no mention of race or color, the claim being that the facially neutral statute was unconstitutionally applied. The defendant showed that in a county where blacks composed 7.5% of the adult population, there had never been a black grand juror in the memory of the witnesses. It was held that a prima facie case of discriminatory application of the selection process had been demonstrated by the defendant, notwithstanding the state official's denials of discriminatory conduct.

Since Norris, most jury discrimination claims have been evaluated in the framework of the "rule of exclusion." Many of the cases subsequent to Norris were, like Norris itself, based upon allegations of the total exclusion of blacks from the juries, a relatively easy matter to resolve. See Hale v. Kentucky, 303 U.S. 613 (1938); Pierre v. Louisiana, 306 U.S. 354 (1939); Hill v. Texas, 316 U.S. 400 (1942); Patton v. Mississippi, 332 U.S. 463 (1947); Reece v. Georgia, 350 U.S. 85 (1955); and Eubanks v. Louisiana, 356 U.S. 584 (1958). Similarly, the cases involving the token inclusion of blacks provided only moderate analytical difficulties. E.g., Smith v. Texas, 311 U.S. 128 (1940); Arnold v. North Carolina, 376 U.S. 773 (1964).

If Strauder, Norris, and Smith are considered to be typical of the first three generations of jury discrimination claims, then the present litigation properly belongs in a fourth generation--

the "underrepresentation" cases. One of the earliest "underrepresentation" cases was Cassell v. Texas, 339 U.S. 282 (1949). Some eight years after this Court had reversed a Dallas County conviction on the grounds of the total exclusion of blacks from grand juries, Hill v. Texas, 316 U.S. 400 (1942), the Court was presented for the second time, after Akins v. Texas, 325 U.S. 398 (1945), with a claim that the jury commissioners in Dallas County were intentionally limiting the number of blacks chosen for grand jury service to one per jury list. The evidence indicated that the Negro population of Dallas County was approximately 15.5% of the total population, although only 6.5% of the registered voters were black. Since eligibility to vote was a qualification for jury service, the Court compared the number of blacks serving on the jury panels--6.7% of the 21 grand juries--with the proportion of blacks on the voter registration lists, and held that the defendant had failed to make out a prima facie case based upon the statistics alone. However, the Court reversed the conviction because of the testimony of the commissioners that their failure to place more blacks on the panels was due to their lack of knowledge of other qualified Negroes.

A reference point for resolution of "underrepresentation" claims has not yet been clearly established. Nevertheless, recent decisions are instructive and do help to establish the outer limits of the applicability of the "rule of exclusion." The leading decisions are Swain v. Alabama,

380 U.S. 202 (1965); Whitus v. Georgia, 385 U.S. 545 (1967); Carter v. Jury Commission of Green County, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); and Alexander v. Louisiana, 405 U.S. 625 (1972).

As the first of the recent "underrepresentation" decisions, Swain v. Alabama, supra, was the only one of the series in which the Court held that the claimant failed to sustain his burden of proving a prima facie case of discrimination. The principal issue to be determined in Swain was the constitutionality of the use of peremptory challenges to totally exclude blacks from petit juries. However, before reaching the troublesome peremptory challenge issue, the Court disposed of the petitioner's claim that blacks had been systematically underrepresented on the grand jury panels. The adult black population of Talladega County was shown to be approximately 26.0% of the total adult population. Although the opinion does not disclose the size of the petit jury venires, it does appear that the grand jury panels during the period in question had about 33 members. Mr. Justice White's majority opinion stated that the inclusion of six to eight Negroes (18.1% to 24.2%) on the grand jury panels did not amount to "token inclusion" within the meaning of previous decisions. Likewise, the inclusion of only 10 to 15% blacks on the grand jury panels and petit jury venires, including one case where black participation reached 23%, failed "to make out a prima facie case of invidious discrimination under the Fourteenth Amendment." 380 U.S. 202, 205-206.

As in Akins v. Texas, 325 U.S. 398 (1945), the Court held that proportional representation of all races and cognizable classes on any one particular grand jury or petit jury venire is not constitutionally mandated.

> Venires drawn from the jury box made up in this manner unquestionably contained a smaller proportion of the Negro community than of the white. But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury role from which petit jurors are drawn. (citations omitted) Neither the jury role nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.
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> * * *
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> We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%. (citations omitted). Swain v. Alabama, 380 U.S. 202, 209.

Weight was also given to the fact that the jury commissioners, testifying on behalf of the State, denied that racial considerations had entered into the selection process. Rather, they testified that

racially neutral lists and sources had been used in compiling the jury rolls. That testimony contrasts sharply with the evidence in the present litigation, for here the State did not even bother to present the commissioners to dispute the very serious allegations of discrimination levied against them.

Other dissimilarities exist. Whereas in Swain, the "overall disparity has been small," 380 U.S. 202, 209, here the disparity has been both enormous and consistent. Likewise in Swain, there was no evidence that the commissioners had the means at hand to identify potential black jurors; the Hidalgo County commissioners could make that identification by merely reading the would-be juror's Spanish surname.

Less than two years after the decision in Swain v. Alabama, the Court decided its next major underrepresentation case, Whitus v. Georgia, 385 U.S. 545 (1967). A unanimous Court voided two convictions that were obtained at the hands of juries, both grand and petit, that were underrepresentative of the substantial black population in the jurisdiction. The opinion in Swain was neither distinguished nor even mentioned by the Court.

The petitioners' previous convictions for murder had been set aside, both by this Court and by the Court of Appeals. Subsequent to the second reversal, the state officials revised the jury list that had been declared discriminatory by the federal courts. Nevertheless, the jury

commissioners continued to use a segregated tax digest, in which the names of blacks were followed by a "(c)," as the primary source for jurors. The defendants were apparently challenging the first jury list drawn by the commissioners after the previous reversal of their convictions, and therefore were not in a position to demonstrate a long-standing statistical pattern of underrepresentation. Instead, they were required to demonstrate purposeful discrimination on the basis of one single selection event.

The evidence offered by the petitioners in the proof of their grand and petit jury claims showed that the adult male population of the county was 42.6% black and that 27.1% of the tax rolls were composed of Negroes. The commissioners drew 33 prospective jurors for grand jury service, of whom only three (9.1%) were blacks. Of the petit jury venire of ninety persons, only 7, or 7.8%, of that number were Negroes. The Court held that this proof alone made out a prima facie case of purposeful discrimination.

> Under such a system the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the commissioners. Indeed, the disparity between the percentage of Negroes on the tax digest (27.1%) and that of the grand jury venire (9.1%) and the petit jury venire (7.8%) strongly points to this conclusion. 385 U.S. 545, 552.

Following shortly on the heels of Whitus, the Court reversed two more Georgia convictions in unanimous per curiam opinions. Jones v. Georgia, 389 U.S. 24 (1967) and Sims v. Georgia, 389 U.S. 404 (1967). In Jones, the petitioner proved that 30.7% of the adult population of the county was Negro, that 19.7% of the taxpayers were Negroes, and that only 5.0% of the jurors on a single list were Negroes. The Court rejected the efforts of the Georgia Supreme Court to distinguish Whitus on the basis of a presumption that the jury commissioners discharged their sworn official duties. The proof in Sims showed the use of the same segregated tax rolls as the source for jurors, a source which contained 24.4% blacks. Nevertheless, only 4.7% of the names on the single grand jury list and 9.8% of the names on the traverse jury list were of black citizens. Following Whitus, the Court reversed Sims' conviction for rape.

In 1970 the Court decided the companion cases of Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) and Turner v. Fouche, 396 U.S. 345 (1970), in which, for the first time, plaintiffs in a civil case, instead of criminal defendants, raised the claims of jury discrimination. Both cases brought into issue the constitutionality of the state statutes governing the selection process, seeking to have those statutes declared facially unconstitutional. The Court rejected those attempts. Nevertheless, in both cases the Court found that the plaintiffs had proven prima facie cases of jury discrimination justifying injunctive relief.

Although in Carter the prima facie case issue was not appealed by any of the parties, this Court impliedly approved of the District Court's finding that the plaintiffs had met their burden of proof. The statistical case offered by the plaintiffs showed that of the 1,198 potential jurors, only 32% of the total were black in a county where the total population was estimated to be about 65% Negro. The Court found that statistical case, in the context of the selection method used, to present a "compelling" record of discrimination. 396 U.S. 320, 337. As Mr. Justice Stewart noted in his opinion for the Court:

> The exclusion of Negroes from jury service because of their race is "practically a brand upon them * * *, an assertion of their inferiority * * *." (citation omitted) That kind of discrimination contravenes the very idea of a jury--"a body truly representative of the community," (citation omitted) composed of "the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." Strauder v. West Virginia, 100 U.S. 303, 308.
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> Carter v. Jury Commission of Greene County, 396 U.S. 320, 330.

Turner v. Fouche, supra, unlike Carter, clearly presented the evidentiary issue on the jury discrimination claim. The evidence indicated that blacks comprised 60% of the general population in Taliaferro County, Georgia, but only 37% of a single 304-member grand jury list. That grand jury list had been compiled pursuant to the instructions of a 3-judge District Court, but the jury commissioners had disqualified inordinate numbers of blacks for lack of "intelligence" or "uprightness," and furthermore had failed to make appropriate inquiries regarding a substantial number of citizens of the community who were unknown to the commissioners.

> In sum, the appellants demonstrated a substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list. They further demonstrated that the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. The appellants thereby made out a prima facie case of jury discrimination, and the burden fell on the appellees to overcome it. 396 U.S. 346, 360.

The last case decided on the merits of the underrepresentation issue was Alexander v. Louisiana, 405 U.S. 625 (1972). Again, the Court was reviewing a claim involving the selection of a single jury,

as opposed to a claim of a continuing pattern of discrimination lasting over several jury selection events. In Lafayette Parish, 21% of the adult population was Negro. The jury commissioners used a questionnaire to locate qualified jurors, and by the use of that device reduced the black participation in the pool to 14%. Two more selections reduced the list of 400 to 7% black participation, which further dropped to 5% on the defendant's grand jury venire and to zero on the grand jury that actually indicted him. The unanimous opinion of the Court found a prima facie case of discrimination based upon the selection system itself, which provided an opportunity for discrimination, as well as upon the statistics themselves.

> The progressive decimation of potential Negro grand jurors is indeed striking here, but we do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral. 405 U.S. 625, 404.

Having reviewed the major decisions of this Court in underrepresentation cases, the strength of the prima facie case made out by this Respondent can now be emphasized. Obviously, as a first comparison, the mathematical disparity of 42.2%, expressed in absolute terms, is much more blatant than in Swain (11%), Whitus (33.5%),

Sims (19.7%), Jones (25.7%), Carter (33%), Turner (23%) and Alexander (14.2%). It might also be useful to compare the statistical disparities existing in this case with those in some lower court decisions: Murrah v. Arkansas, 532 F.2d 105 (8th Cir. 1976) (prima facie case: 19.7% adult black population, but only 5.6% to 7.3% on jury roll); Thompson v. Sheppard, 490 F.2d 830 (5th Cir. 1974) (no prima facie case: 30.2% total black population, and 19.2% black representation on jury lists drawn at random from county voting list); Black v. Curb, 464 F.2d 165 (5th Cir. 1972) (prima facie case: 69% total black population and 60% adult black population, but only 35% black representation on jury list); Colson v. Smith, 438 F.2d 1075 (5th Cir. 1971) (prima facie case: 30.7% adult black population and 14% black taxpayers, but only 1.2% blacks on venires and 1.3% black representation in grand jury pool); Preston v. Mandeville, 428 F.2d 1392 (5th Cir. 1970) (prima facie case: 29.3% adult black population, but only 15% black representation on master jury roll); Muniz v. Beto, 434 F.2d 697 (5th Cir. 1970) (prima facie case: between 15% and 20% registered Mexican-American voters, but only 3% of grand jurors during ten-year period); Simmons v. United States, 406 F.2d 456 (5th Cir. 1969) (no prima facie case: 20.48% black population, and 15.77% black representation in jury wheel); Salary v. Wilson, 415 F.2d 467 (5th Cir. 1969) (prima facie case: 55% adult black population, but only 12.9% and 7% black representation on jury rolls in last two years); Jones v. Smith, 420 F.2d 774 (5th Cir. 1969) (prima facie case: 31.9% adult black population and 15.3% black taxpayers,

but only 4.85% black representation on single jury panel drawn from segregated tax digest); Hunt v. United States, 400 F.2d 306 (5th Cir. 1968) (no prima facie case: 35% total Mexican-American population, with 17.5% Mexican-American representation in the jury pool); Pullum v. Greene, 396 F.2d 251 (5th Cir. 1968) (prima facie case: 55.5% total black population, but only 17.9% and 21.7% black representation on revised jury lists); Goins v. Allgood, 391 F.2d 692 (5th Cir. 1968) (prima facie case: 32% total black population, but only 16% blacks on grand juries); Rabinowitz v. United States, 366 F.2d 34 (5th Cir. en banc, 1966) (prima facie case: 34.5% black voters, but only 5.9% black representation on jury lists); Labat v. Bennett, 365 F.2d 698 (5th Cir. en banc, 1966) (prima facie case: 32% total black population, but only 3.7% black representation on venires); Scott v. Walker, 358 F.2d 561 (5th Cir. en banc, 1966) (prima facie case: 15% registered black voters but only 3 to 5 blacks among 300 veniremen over previous 5-year period, though proof was scarce); Davis v. Davis, 361 F.2d 770 (5th Cir. en banc, 1966) (prima facie case: 20% total black population and 16% adult male black population, but only 7.5% blacks on jury venires and jury commissioners failed to seek out qualified blacks); Vanleeward v. Rutledge, 369 F.2d 584 (5th Cir. 1966) (prima facie case: 30% adult black population and 14% black taxpayers, but only .75% blacks on jury lists).

The 40.2% underrepresentation of Mexican-Americans over a 10-year period

in Hidalgo County is greater than the disparities existing in any of the cases cited above, with the exception of the 42.1% to 48% disparity in Salary v. Wilson, supra. The disparity in the percentages is greater than that characterized as "vast" in Muniz, supra (12% to 17%) and as "tremendous" in Vanleeward, supra (29.25%). Both the District Court and the Court of Appeals recognized that the gross disparities in Hidalgo County, by and of themselves, made out a prima facie case of purposeful discrimination. Though apparently not recognized by the District Court, Respondent's proof went even further.

That additional proof in support of his prima facie case is the Texas selection system itself. Although passing constitutional muster on several previous occasions before this Court, Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); and Hernandez v. Texas, 347 U.S. 475 (1954), it is still a system whose "potential for abuse is great," as recognized by the District Court. 384 F.Supp. 79, 91. The vice, of course, is its invitation to the jury commissioners to exercise their wholly-unfettered subjective discretion in the selection process. Indeed, the state trial judge testified in the habeas corpus hearing below that he did not even give instructions to the jury commissioners regarding their obligation to choose an ethnically representative list of potential jurors. App. 79. It should not be surprising, then, that the panel chosen by the commissioners for the March Term, 1972, was underrepresentative of Mexican-Americans by 30%.

It should also be emphasized that the disparities in the case under consideration were not the product of an isolated, fortuitous event. Rather than relying upon the results in the selection of the single jury that returned the indictment against him, as in Whitus and Alexander, Partida offered the lower courts 47 separate selections by the various Hidalgo County jury commissioners. App. 17-18. Those selections demonstrate a consistent, uniform pattern of underrepresentation lasting over an extended period of time. More than any other single element of proof, that long-term pattern of exclusion demands a finding of discrimination.

In summary, Respondent proved a prima facie case of purposeful jury discrimination based upon (1) the underrepresentation of his ethnic group by 29.2% on the list of grand jurors drawn by the commission, (2) the underrepresentation of Mexican-Americans by 37.5% on the actual grand jury that returned the indictment against him, (3) the systematic, long-standing underrepresentation of Mexican-Americans by 40.2% on the grand jury venires over a ten-year period, or by 33.7% during the period while the incumbent state judge was selecting the commissioners, (4) the use by the State of Texas of a system of selection that relies upon the unfettered subjective discretion of "key men" as the source for potential jurors, (5) the easy identification of Mexican-Americans through their Spanish surnames by those who would discriminate, and (6) the failure of the state trial judge to instruct his commissioners not to discriminate on the basis of national origin. Hence, both the

District Court and the Court of Appeals correctly held that Respondent had proven his prima facie case; it remained for the prosecution to come forward with sufficient evidence to rebut that case, if such evidence existed.

C. The State Failed To Rebut Respondent's Prima Facie Case.

As indicated above, the lower courts agreed that Partida had proven a prima facie case. They disagreed on whether the State had offered an adequate explanation for the apparently discriminatory results. That difference in the assessment of the adequacy of the State's rebuttal case flows in part from the more rigorous standard imposed by the Court of Appeals for the evaluation of the State's proferred evidence.

> [T]he unbridled discretion afforded the jury commissioners to prepare the grand jury list requires close scrutiny of the disparities and the proof offered to explain them. Partida v. Castaneda, 524 F.2d 481, 484 (5th Cir. 1975).

Accord, Murrah v. Arkansas, 532 F.2d 105, 110 (8th Cir. 1976). As will be seen, we submit, the State's proof cannot meet even a lenient standard of review, much less the "close scrutiny" of this Court.

In evaluating the rebuttal case offered by the Petitioner, it should be borne in

mind that two opportunities have been presented to the State to produce a constitutionally legitimate explanation for the blatantly discriminatory results of the jury selection process. Indeed, the State came to the habeas corpus hearing in the District Court forewarned that the Sheriff would bear the burden of proving an adequate explanation for the unequal treatment received by Mexican-Americans in Hidalgo County. See Memorandum And Order, April 15, 1974. App. 12-13. The failure to produce adequate evidence in the face of the District Court's order must raise a presumption that an adequate explanation does not exist.

To rebut Partida's prima facie case, the State called only one witness--the state trial judge who supervised and participated in the selection of the grand jury that indicted Respondent. Judge Alamia, himself a Mexican-American, was never asked for his opinion by the Petitioner as to how the jury panels in Hidalgo County could be so enormously and so consistently disproportionate to the ethnic balance in the community. Moreover, the judge admitted that the results of the selection process were not representative of a cross-section of the Hidalgo County community.

No evidence was offered by the State to rebut the statistics presented by Respondent, either the statistics showing that Mexican-Americans as a class were subject to discrimination nor the statistics from the Court's records showing that the predominant ethnic group in the county had never been represented on grand juries

in numbers proportionate to their numbers in the community. The State did not even offer the testimony of any of the jury commissioners who selected Partida's grand jury, commissioners who might have been able to explain how they managed to select a jury panel that was 30% underrepresentative of Mexican-Americans. The failure of the State's rebuttal evidence left the District Court to attempt explanations on its own, explanations that in most part were unsupported by any evidence in the record. For example, the lower court thought that perhaps a greater proportion of Mexican-Americans would be excluded because there was a "larger ineligible migrant and illegal alien population" in the county. 384 F.Supp. 79, 89. In addition to the fact that there is absolutely no evidence in the record to support those conclusions, at least one is patently erroneous. If the District Court was referring to migrant farm workers as a sub-class of Mexican-Americans who would be excluded from jury service, that conclusion is incorrect. There is nothing about a seasonal farm worker's occupation, an occupation that takes him out of the state for three or four months during the summer harvest season, that disqualifies him from grand jury service. The migrant farm worker remains a Texas resident for purposes of voting, jury service, and other similar civil rights and duties.

The District Court also believed that the disparity could apparently be explained by taking a fewer number of years into consideration in the selection results. Respondent had offered the ten-year sample

as showing a historical pattern of exclusion or underrepresentation of the group in question, thereby reducing to approximately infinity the possibility that the results in the composition of his grand jury were merely fortuitous. The District Court thought a more limited number of years would be appropriate, since it categorized the county as one undergoing "rapid growth," and as being a "rapidly changing area." 384 F.Supp. 79, 89. Again, there was simply no evidence in the record to support such a conclusion, but irregardless of the period of time chosen, the disproportion is merely reduced to 33.7% from 40.2%. Such a vast disparity, particularly when coupled with the abuse-prone Texas selection system, must still point firmly in the direction of discrimination.

Perhaps the most plausible explanation offered by the District Court is one which does not pass Equal Protection scrutiny. The lower court suggested that the state trial judge chose jury commissioners from his own high socio-economic level, and that those commissioners, in turn, chose potential grand jurors from the same high socio-economic class. 384 F.Supp. 79, 90. Once more, the State had failed to produce any evidence that the judge or commissioners were influenced by such considerations. Nevertheless, that explanation merely substitutes discrimination on the basis of wealth for discrimination on the basis of national origin, both of which are condemned. Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Labat v. Bennett, 365 F.2d 698 (5th Cir. en banc, 1966).

See also, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956); and Smith v. Bennett, 365 U.S. 708 (1961). Though the explanation offered may be a plausible one, it is not a constitutionally legitimate one.

Hampered by the deficiencies in the record caused by the failure of the State's proof, the District Court sought to distinguish all precedent decisions in this field of litigation on the basis that the victims of that discrimination were either a minority or a "non-governing majority." In support of such a distinction the lower court cited Black v. Curb, 464 F.2d 165 (5th Cir. 1972); Turner v. Fouche, 396 U.S. 346 (1970); Pullum v. Greene, 396 F.2d 251 (5th Cir. 1968); and Salary v. Wilson, 415 F.2d 467 (5th Cir. 1969). Not only do none of the cited opinions articulate the "non-governing majority" distinction, none of them, with the possible exception of Turner, even discussed the level of political participation by the class subjected to discrimination. The Turner opinion mentions political participation only tangentially and in connection with the unusual role played by the grand jury in the election of the board of education. There is absolutely no suggestion that blacks in Georgia would not be heard to complain of discrimination if they were a "governing majority."

The "governing majority" distinction is not only completely without precedent, but it would be an extremely dangerous and cumbersome departure from the law of jury discrimination. For example, the District

Court's announcement that Mexican-Americans are a "governing majority" in Hidalgo County has virtually no support in the record in this case. There are no figures showing the numbers of registered Mexican-American voters as compared to Anglo voters, nor the number of Mexican-American officeholders and the types of offices held. Needless to say, the level or degree of participation by any identifiable class or group in the processes of the body politic is a frequently difficult determination, even by experts in the field of political science.

Not only would the "governing majority" rule be cumbersome and difficult in its application, it would be dangerous as well. The lower court has announced the rule that once a class of victims has achieved "governing majority" status, then members of that class may no longer complain of a conviction obtained at the hands of a jury from which members of the class have been systematically excluded. Such a rule mocks the Fourteenth Amendment's promise of a trial before an impartial jury of one's peers.

The Court of Appeals correctly rejected the District Court's effort to afford the State a sanctuary behind the all-encompassing walls of the "governing majority" doctrine.

> The fact of governing majority status may mollify the prima facie case, but it does not nullify it. This may be done only by proof to explain the disparity. Without it, petitioner

> must prevail. Partida v. Castane
> 524 F.2d 481, 484 (5th Cir. 1975)

In addition to the foregoing, the Respondent contends that the "governing majority" notion is essentially meaningless. Whether Mexican-Americans constitute a voting majority and whether they hold offices unrelated to the jury selection system can have only the most indirect of bearing on the issue of discrimination in the selection of grand jurors. Undoubtedly the element causing the District Cou the greatest concern was the involvement of a Mexican-American judge and a majorit of Mexican-American commissioners in the selection of Partida's jury. The theme of the lower court's opinion, taken in it entirety, is a concern that a discriminatory intent not be imputed to the state judge and jury commissioners, unless dire evidence of such intent were to be presented by Respondent. That concern overlooks the fact that year after year, list after list, Mexican-Americans have been substantially underrepresented on Hidalgo County grand juries. That result, violative of the constitutional obligations of the jury commissioners, is obvious even to the most casual observer.

> If one factor is uniform in a continuing series of events tha are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose. The purpose may not be of evil intent or in conscious dis-

> regard of what is conceived to be a binding duty. Prohibited conduct may result from a misconception of what duty requires. Such misconception I believe to be the real situation on the record before us. Cassell v. Texas, 339 U.S. 282, 293 (1950) (Frankfurter, J., concurring).

That Mexican-American commissioners would select Anglos in disproportionate numbers to their own ethnic group is not a phenomenon unique to South Texas, nor does it vitiate the Respondent's prima facie case of discrimination. A very recent opinion of another Court of Appeals shows the same forces at play. Murrah v. Arkansas, 532 F.2d 105 (8th Cir. 1976). In a jurisdiction where approximately 19.7% of the population was black, the state court chose ten jury commissioners, two of whom were black. Nevertheless, those jury commissioners returned jury venires that were only 5.6% to 7.25% Negro. The Court of Appeals found discrimination on the basis of that record, in spite of the fact that 20% of the commissioners were themselves black. The testimony of those commissioners was particularly illuminating. One of the black commissioners testified that he submitted names of more black persons than white, while the other indicated that she had picked only one or two black persons, and the rest white. Such results graphically demonstrate the subtle interplay of the various forces existing in the selection process.

Other instances of similar conduct by the victims of discrimination have occurred in the history of this Court's decisions. In Green v. School Board of New Kent County, 391 U.S. 430 (1968), the Court considered the validity of a "freedom-of-choice" plan to desegregate a school district in Eastern Virginia. This Court's rejection of the school authorities' plan was based, in part, on the fact that 85% of the Negro school children still attended a segregated school even though they were free to attend the previously all-white school. Obviously, well-entrenched and long-standing patterns of social behavior do not change easily, whether the subject be service on juries or school attendance.

The State seems to rely upon a presumption, never proven, that Mexican-American jury commissioners would not consciously or sub-consciously make selection decisions that effectively exclude a vastly disproportionate number of their own ethnic group from the grand juries. The presumption sought by the State is simply at odds with the overwhelming evidence in the record. Furthermore, that presumption would countenance a profound departure from the oft-articulated norm of the jury as being representative of a cross-section of the community. The State would have this Court approve a selection process that has subverted the fair cross-section goal, making a 100% change in the qualitative flavor of the jury from what should be 80% Mexican-American participation to 80% Anglo participation. Just as a mirror image

should not be required, neither should a surrealistic distortion be ratified.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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